(23,177)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 239.

DAVID J. STEWART, PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE STATE OF MICHIGAN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

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a DAVID J. STEWART, Plaintiff in Error,
VS.
THE PEOPLE OF THE STATE OF MICHIGAN, Defendant in Error.

RECORD.

1 STATE OF MICHIGAN:

Supreme Court.

THE PEOPLE OF THE STATE OF MICHIGAN, Plaintiffs,
VS.
DAVID J. STEWART, Defendant.

Peddling Without License.

In the Circuit Court for the County of Berrien.

Record.

Criminal Warrant.

STATE OF MICHIGAN,
County of Berrien, ss:

To the Sheriff or any Constable of said County, Greeting:

Whereas, I. W. Allen hath this day made complaint in writing and on oath, to me, Fremont Evans, a justice of the Peace of the City of St. Joseph, in said county, that heretofore towit; on the 1st day of August A. D., 1909, at the — in the county aforesaid and for ten days preceding said day, one David J. Stewart did travel
2 from place to place within the County of Berrien, State of Michigan for the purpose of taking orders for the purchase of goods, ware and merchandise, by sample, lists and catalogues, without having then and there obtained a license as a hawker and peddler as required and provided by act 136 of the compiled laws of Michigan, of 1897, as amended, as he the said I. W. Allen is informed and believes and has good reason to believe.

Contrary to the form of the Statute in such case made and provided, and against the peace and dignity of The People of the State of Michigan:

And Whereas, on examination, on oath, of the said I. W. Allen and of Charles Pagel, a witness produced by him, by me, the said Justice of the Peace, it appears to me, the said Justice of the Peace that said offense has been committed, and there is just cause to suspect the said David J. Stewart to have been guilty thereof; therefore,

In the Name of The People of the State of Michigan, you, and each of you, are hereby commanded forthwith to arrest the said

David J. Stewart and bring him before me, the said Justice of the Peace, to be dealt with according to law.

Given under my Hand and Seal, at the City of St. Joseph, in said county, on the 8th day of November A. D. 1909.

FREMONT EVANS,
Justice of the Peace.

Return to an Appeal.

STATE OF MICHIGAN,
Berrien County, ss:

I, the undersigned Fremont Evans, one of the Justices of the Peace in and for said County, do hereby certify and return
3 to the Circuit Court of the said County of Berrien that on the 8th day of November A. D. 1909, one I. W. Allen, Mayor of City of St. Joseph, made complaint to me that David J. Stewart did on the 1st day of August A. D. 1909 in said County and for ten days preceeding that day, travel from place to place within the County of Berrien and State of Michigan for the purpose of taking orders for the purchase of goods, wares, and merchandise, by sample lists and catalogues without having then and there obtained a license as a hawker and peddler as required and provided by Act number 136 of the compiled laws of the State of Michigan, of 1897, as he the said I. W. Allen is informed and believes and has good reason to believe, whereupon I, the said Justice, did examine the said complainant, and Charles Pagel, a witness, produced by him, on oath, which said complaint was reduced by me to writing and subscribed by the said I. W. Allen, and it appearing to me, the said Justice, that said offense had been committed, I issued a warrant directed to a Sheriff or any Constable of said County and commanding such Sheriff or Constable forthwith to arrest the said David J. Stewart and bring him before me or some other Justice of said County, to be dealt with according to the law; which said warrant was on November 9th, 1909, returned to me by Owen McAntee, Deputy Sheriff, with the body of said David J. Stewart in his custody, and the charge made against the said David J. Stewart as stated in the warrant to arrest was distinctly read to him, the said David J. Stewart, and he being required by me to plead thereto, stood mute and I entered a plea of not guilty for him.

By consent of both parties, case adjourned to Dec. 21st, 1909, 9 A. M., at my office, at which time respondent appeared in person and by attorney and expressly waived a trial by jury, then N. A.
4 Grinnel, Wm. Jasper, Chas. Pagel and Owen McAntee were sworn and testified for the people, respondent offered no testimony.

I did find the said David J. Stewart guilty; whereupon I, the said Justice, did render judgment that the said David J. Stewart should pay a fine of $25 and costs of $15, and that in default thereof, he should be imprisoned in the County Jail of said County of Berrien 30 days, from and including the 21st day of December A. D. 1909.

And thereupon the said David J. Stewart appealed from the said

judgment and sentence to the Circuit Court for the said County of Berrien and did then and there on the 21st day of December A. D. 1909, enter into a recognizance before me as required by law, himself in the sum of one hundred dollars, with sureties approved by me, in the sum of one hundred dollars, each conditioned that the said David J. Stewart should appear before the Circuit Court of said County on the first day of the next term thereof and prosecute his appeal at said term; to effect and abide the order and judgment of said Court, and thereupon I discharged the said David J. Stewart.

And I do further certify and return that the said recognizance together with the testimony taken by me in said cause, is also annexed to this my return to said appeal and herewith returned to said Circuit Court.

Given under my hand in the City of St. Joseph in said County on this 21st day of December A. D. 1909.

FREMONT EVANS,
Justice of the Peace.

5 Page 4, Circuit Court Journal S.

At a General Term of the Circuit Court for the County of Berrien, Continued and Held at the Court House in the City of St. Joseph, in said County, on Tuesday, December 6th.

Present: Hon. Orville W. Coolidge, Circuit Judge.

Court opened for business in due form.

THE PEOPLE OF THE STATE OF MICHIGAN
vs.
DAVID J. STEWART, Respondent.

The respondent in this cause being present in Court and the jury heretofore empaneled, tried and sworn well and truly to try and true deliverance make between the People of this State and Prisoner at the bar whom they should have in charge, according to the evidence and the laws of this State; sat together and heard the concluding proofs and allegations of the parties, the arguments of counsel and the charge of the Court, retired from the bar thereof under the charge of Wm. T. Howland an officer of Court duly sworn for that purpose, to consider of their verdict to be given and after being absent for a time, return into court and say upon their oath that they find the said David J. Stewart guilty in manner and form as the said people have in their information in this cause charged.

It is hereby ordered that the respondent appear at this court on the first day of the February term thereof to receive the sentence of this Court.

The Court grants the respondent 20 days in which to make a motion for a new trial and 60 days to file a bill of exceptions.

ORVILLE W. COOLIDGE,
Circuit Judge.

6 THE PEOPLE OF THE STATE OF MICHIGAN
VS.
DAVID J. STEWART.

Docket Entries.

1909, Dec.	22.	Filed Justice's Return to an Appeal.
1910, Dec.	5.	Trial Commenced.
Dec.	6.	Trial Concluded. Verdict guilty.
Dec.	6.	Filed Defendant's Requests.
1911, Jan.	31st.	Court grants Defendant 30 days' additional time to file a Bill of Exceptions.
May	4.	Time for filing bill of exceptions extended to May 15th, 1911, by stipulation and order of Court.
May	8.	Files certified to Supreme Court.

Bill of Exceptions.

STATE OF MICHIGAN:

The Circuit Court for the County of Berrien.

THE PEOPLE OF THE STATE OF MICHIGAN, Plaintiffs,
VS.
DAVID J. STEWART, Defendant.

Peddling Without License.

At a Session of the Circuit Court for the County of Berrien, Held at the Court House in the City of St. Joseph, in said County, on the 5th Day of December, A. D. 1910, Before Hon. Orville W. Coolidge, Circuit Court Judge.

The issue point between the parties came on to be tried by a jury, William H. Andrews, as prosecuting attorney, ap-
7 peared for the people and George W. Bridgman appeared, as attorney for the Defendant.

OWEN MCANTEE, sworn as a witness for the people, testified as follows:

I reside in St. Joseph. Was Chief of Police of the City of St. Joseph in the month of August last year.

Did you have any talk with the defendant along about that time regarding the question of a license for hawking and peddling,

Mr. BRIDGMAN, for the Defendant: To save rights, I object to the introduction of any testimony under the complaint and warrant in this case, for the reasons:

1st. That the complaint and warrant sets forth no crime known to the laws of the State of Michigan.

2nd. The complaint and warrant do not negative or show that the defendant was not selling his own work or production by sample; nor that he was not peddling meat or fish; nor that he was not a merchant who was conducting a regularly established mercantile business in the County of Berrien for at least one year previous; nor that he was not a wholesale merchant selling by sample to dealers.

3rd. That the law of the State of Michigan mentioned in the complaint and warrant in this case, and upon which such complaint and warrant is made, is unconstitutional for the following reasons: (1st) That such law is in violation of section 8 of article I of the Constitution of the United States, which vests in the Congress of the United States the powers to regulate commerce between the states; and as well in violation of section 2 of article 4 of such constitution, which provides that citizens of each state shall be entitled to all privileges and immunities of citizens in the several states. And also that such law is in violation of article I of the 14th amendment to the constitution of the United States, which provides that no state shall
8 make or enforce any law which abridges the privileges or immunities of the citizens of the United States, nor deny to any person the equal protection of the laws.

Because such law discriminates against the citizens of different states, and is in restraint of interstate commerce in this, that such law expressly exempts from its operation any merchant who has been conducting a regularly established mercantile business in any county of the state for a period of at least one year previous; and also it provides that any wholesale merchant shall not be prevented by anything herein contained from selling to dealers by sample without any license.

4th. Because no preceedings were had, as appears by the complaint and warrant in this case, and such complaint and warrant were not issued until after sixty days from the time in which the offense mentioned in such warrant and complaint were alleged to have been committed.

The COURT: As far as the question of the constitutionality of the law is concerned I will not consider that now. I would like to hear the complaint read now.

The COURT: We will go ahead with the testimony and you can argue the questions of law hereafter.

The COURT: The motion will be over-ruled pro forma.

Exception by Defendant (last question read.)

A. Yes, sir; I think the complaint was made in August sometime. I remember the time. The talk with the defendant was before the complaint was made. The complaint was made the same day or the day after, the conversation, along in the afternoon. I talked with him at the car in St. Joseph where he was unloading the stuff. I asked him if he had a license. He said he had not. That was all the talk I had with him. The warrant was served the same day it was sworn out.

9 DE FORREST LEACH, sworn for the people testified:

I reside in St. Joseph and have resided there ten years last spring. I am in the transfer business and was in that business during the summer of 1909. I know defendant.

Q. Did you do any transferring for him during the year 1909?

A. I probably did but I have not got it down so I can tell. I done work for him off and on all the while since he has been delivering.

Q. How long has that been?

Mr. BRIDGMAN, for Defendant: I think we will object to that and object to any evidence now except as stated in the warrant the first ten days previous to the 10th day of August, A. D. 1909.

The motion is denied. Exception noted.

A. Mr. Stewart has been delivering goods somewhere in the neighborhood of two years, I believe. I could not tell exactly.

Q. Have these different shipments been put up in the same form?

A. As near as possible, yes.

Mr. BRIDGMAN: To that we object and move to strike out the answer.

The COURT: Two years prior, you mean? To the first of August?

Mr. ANDREWS, Prosecuting Attorney: Two years from now, back?

Objection over-ruled. Exception noted.

Q. What nature of goods or what class of goods have been received there during that time?

A. There was flour and all merchantable goods, such as eatable goods, flour, rasins, prunes, currants, sugar, tea, coffee, canned goods and crackers.

Q. How were those goods put up there at the car, for instance, flour?

A. In one hundred pound sacks.

Q. How was the sugar put up?

10 The COURT: You mean when they were received by the defendant at the car?

Mr. ANDREWS: Yes.

A. Generally in a one hundred pound sacks, according to what a man wanted.

Q. When you would get those goods at the car what would you do with them?

A. Deliver them around to where—different addresses in the city.

Q. Do you know whether all the goods was sold in the city or not that would come in those carload lots?

A. No, there was a lot of them that went in the country, but I did not have nothing to do with that.

Q. How would you know to whom those goods were to be delivered?

A. From the address given me by Mr. Stewart.

Q. How would you know what would go to that address?

A. I had a list I got from Mr. Stewart.

Q. Was there anything on the goods that indicated where they were to go?

A. Why, the address was there, yes. He gave me the address. The address wasn't on the goods, no, but they were on the list he gave me.

Q. Was there anything on the goods to indicate where they were to go?

A. No, sir.

The COURT: How did you determine where to deliver the goods?

A. By the address given me by Mr. Stewart.

Q. Was there not something on the package also?

A. No, sir, I told you I had the list.

The COURT: It does not appear plain.

Mr. O'HARA: Supposing there is a lot of canned goods here, a hundred cans of tomatoes, and he gets a list to deliver to John Jones ten cans and Mary Smith five cans, he takes ten cans and delivers it to one and five to the other.

11 Q. Is that the way the delivering was done, Mr. Leach?

A. Yes, sir.

Cross-examination by Mr. BRIDGMAN:

I know what an invoice is.

A. Mr. Stewart made out a list of the goods he wanted taken out.

Q. He was at the car?

A. Yes, sir.

Q. He delivered the goods to you from the car to be taken to the different addresses?

A. Yes, sir.

Q. Handed them out of the car.

A. Yes, sir.

Q. He had an invoice there.

A. Sure, an invoice he made out himself.

Q. He checked from that invoice and handed you those packages and directed you to deliver them such and such a place?

A. Yes, sir.

Q. Did you notice whether the packages, whether there were any marks on them or not?

A. Just the number of pounds there was in each package was all and the kind of stuff the package contained.

Q. Was there not a number corresponding with the number on the invoice?

A. No.

Q. You don't recollect about that?

A. No, Mr. Stewart made out a separate list for each man to deliver.

Q. He had a list and handed the goods to you to be delivered at such a place?

A. Checked them off as he handed them out.

Q. He checked off from another list that he had, didn't he?

A. He had them in a book of his own. He checked them off from that.

Q. From orders he had previously taken?

A. Yes, sir, this flour in hundred pound sacks was delivered in hundred pound sacks.

Q. Where sugar was in the package it was delivered to
12 you in the same way?

A. Yes, sir, the different packages were handed to me from that place.

Q. You said some went in the country, did the parties come to the car and get their stuff?

A. Yes, sir, as near as I can understand it. That is something I did not pay any attention to at all. I got those goods out of the car. A car would come in. I do not know where it came from. Must have come from somewhere. All the goods I have been testifying to, I took directly from the car.

Redirect examination by Mr. ANDREWS:

I took no orders for those goods.

Q. Did you store any of the goods some place, draw them to a storage and put them in storage?

A. Occasionally a lot was left over that wasn't wanted and I had them in my possession down there.

Q. What do you mean by a lot that wasn't wanted?

A. Where folks would order stuff and when they came they would not be in shape to take them.

Q. What was done with the goods?

A. Some returned back to Chicago and some of them was sold to other parties on orders that was previously taken.

Q. What did Mr. Stewart have there that he called an invoice?

A. A list that he made out of the goods that he wanted me to take out, that is all I know. Goods that he had sold. The packages varied in size. Some sugar was put in twenty-five pound size and some in fifty and some in a hundred—majority of them in hundreds.

The COURT: Did he have an office, a regular place of doing business?

A. No, sir. Well, out of the car. I could not tell you how long the car would stand there from the time it came in until it was unloaded.

Q. Would they deliver from the car before putting the balance in storage?

13 A. That is a hard question to answer. He would deliver until the goods were all delivered, all the orders he had. Sometimes be a longer time than others. A great majority of times the car would be on the Pere Marquette sidetrack, in St. Joseph.

Q. Did you collect any money?

A. No, sir, once in a great while when I first commenced to deliver, I collected a little but not very much. All I did was to deliver the goods to the house and he would attend to the collections himself at some subsequent time.

Mr. BRIDGMAN, for Defendant: I move to strike out all the testimony of the witness, on the ground that he is not charged with delivering. He is simply, under the warrant and complaint, charged with taking orders with no other charge, therefore I move to strike out the testimony of the witness.

The COURT: The motion will be denied pro forma.

Exception noted.

GUSTAV ERGANG, a witness sworn for the people testified:

I live in the City of St. Joseph. Know Mr. Stewart, have known him for several years. I do some delivering for him. I am in the general teaming and draying business.

Q. What kind of goods have you been delivering for him?

Mr. BRIDGMAN: To that we object on the ground mentioned in the previous motion to strike out the testimony of the other witness, that he is not charged with selling and delivering, but simply charged with taking orders. No other charge in the complaint and warrant.

The COURT: The objection is over-ruled.

Exception noted.

14 A. Flour and different kinds of groceries, such things as you usually find in grocery stores, some canned goods, coffee, tea, and so on.

Q. How would those goods get there?

A. Shipped them in by car, or at times, by boat. When he delivers in Stevensville, he has cars there and he goes to Benton Harbor. I delivered goods for him in the summer of 1909.

Q. Did you at times collect?

A. Yes, sir, when people offered me money I took the money. I could not make an exact statement of the greatest amount of goods I delivered in one day, in dollars and cents, but I believe it amounted some days up to three hundred dollars. I delivered only in the city.

Q. Did you ever take any orders for him?

A. If people asked me to tell Mr. Stewart to send them so and so, I told Mr. Stewart about it and let him know that such and such spoke to me and wanted a barrel of flour or whatever it was. I could not say whether they would get it or not, but I gave Mr. Stewart the order.

Q. Did you ever see Mr. Stewart taking orders?

A. No, sir; I have bought goods myself, but my wife gave the order, I don't know about it.

Q. Someone would go around from house to house?

A. He came to my house, yes.

Mr. BRIDGMAN: I object to that, this man is charged with peddling, or going around and taking orders, and not somebody else.

Q. He said his wife, did you not?

A. Yes, sir.

Q. Were there times when people would not call for goods or take them, that they had ordered?

A. I do not know. I only delivered in the city and I did not pay any attention to Mr. Stewart's business at all. People sometimes refused to take the goods and I took them back to the car.

Q. What would happen with them.

A. I would put them in the car, that is all I know.

CLELLA BORT, a witness sworn for the people testified:

I live in the City of St. Joseph. I know Mr. Stewart. I have met him at my house sometimes in the summer of 1909. He was taking orders for groceries and asked me for an order.

Q. Did you take?

A. Yes, sir, I took some canned goods and raisins, coffee, cocoanut, peas and salmon. Mr. Yeske, a drayman, afterwards brought those goods to me. Mr. Stewart called at my place last fall for another order. I did not give it to him, at that time. The amount of the order I gave him a year ago—somewhere around five dollars.

Cross-examination by Mr. BRIDGMAN:

Q. When was it you ordered those goods?

A. I cannot just exactly recall the time. Sometime a year ago last summer. Might have been in August or a little later, but I cannot just recall.

Q. Was it in July?

A. I do not remember.

Q. Are you sure it was not in July?

A. I cannot positively say. It was sometime during the summer Mr. Stewart, himself came to my house and I gave him an order.

Q. From where were those goods coming?

A. I think Chicago.

Q. He so told you?

A. I think he did.

Q. You ordered them from Chicago, then?

A. Yes, sir.

Q. He said that he would send them to you from Chicago?

A. I do not just remember if he worded it that way or not.

Q. To be sent by him to you from Chicago?

Mr. O'HARA: Wait, she ordered the goods from him.

The COURT: You put it as if she ordered from Chicago.

Mr. BRIDGMAN: Ordered from him these goods to be sent her from Chicago.

The COURT: Whatever he said you may bring out.

Q. What did he say?

A. I don't just remember, it is so long ago.

Q. You gave him an order? He didn't get you any goods that day you ordered them.

A. He did not.

Q. About how long was it before the goods came?

A. As near as I can estimate, two or three months. It was later in the fall, quite a little bit.

GUSTAV ERGANG, recalled:

Q. About how frequently during the year would these orders be taken?

Mr. BRIDGMAN, for Defendant: I think we will object on the ground heretofore stated.

The COURT: Objection over-ruled.

Exception noted.

A. I could not say how often the orders were taken, but I believe the stuff is delivered about twice a year. I would order some goods and they would be sent to me afterwards.

Q. (Showing the witness a paper.) I show you Exhibit 1 and ask you what that is?

A. That is a duplicate slip of an order that Mr. Stewart has taken at my house.

Q. That is in the hand-writing of Mr. Stewart?

A. I expect so.

Mr. BRIDGMAN: Did you see it taken?

A. No, sir, my wife gave the order.

Mr. O'HARA: I offer it in evidence.

17 Mr. BRIDGMAN: I object to it for the reason heretofore stated.

Mr. O'HARA: The date is August 20th, 1909.

The COURT: The objection is over-ruled.

Mr. BRIDGMAN: I further object that the order is before the time stated in the complaint and warrant,—after the time.

Mr. O'HARA: We claim any time within a year.

Mr. O'HARA (reading): August 20th, 1909. Mrs. Gus Ergang, 818 Church street. At —. How shipped —. Terms —. When —. 100 lbs. sugar, ½ barrel flour, ½ barrel rye flour, 3 doz. matches, 1 doz. Kirke soap, five 6 x 7 prunes.

The WITNESS: That is the number of prunes in some way.

Mr. O'HARA (continuing): And five pounds of bleached Sultana raisins."

Q. I notice some bills here that do not bear any date, but is that the way the bill would come to you?

A. Yes, sir.

Mr. O'HARA (reading): "Mrs. Gus Ergang, 818 Church street. Bought of D. J. Stewart, Wholesale Grocer, 4424 Union Avenue, Chicago, one barrel of flour, $5.70. G. Ergang."

Q. You have your own name written on there. What is that for?

A. That is when the goods were delivered, probably nobody was home and one of the children signed the bill, and later Mr. Stewart came himself and got the money.

A. That is the receipt of the person getting the goods.

Mr. BRIDGMAN: There is also "Specialties: (On one corner)—
18 Badger Flour
" Baking Powder
" Extracts
" Spices. Telephone No. Yards, 821.

Cross-examination by Mr. BRIDGMAN:

I cannot state when those goods were delivered, but they were delivered about two months or so after the order was taken. This is a duplicate order. Mr. Stewart makes the order out on carbon to keep one and giving the party the other to check up when this bill comes, whether the order is delivered the way it is taken. After the goods were received I paid by this, about a couple of months afterwards. I was engaged in the draying business at that time. When I got goods I went down and took them out of the car. Mr. Stewart was there and handed them out to me from the car.

Redirect examination by Mr. O'HARA:

A regular freight car would come in here twice a year or thereabouts. Mr. Stewart had charge of the car and he gave me the goods. In the car were all sorts of groceries.

Q. Give us your general idea what kind of goods would be in the car? Ten or fifteen different kinds.

A. Mr. Stewart handles flour, matches, coffee, tea, and canned goods to a certain extent, fish, that is herring, and soap, and chocolate, cocoa,—a general line of groceries. The coffees come in packages whatever the order is there, five pounds, or ten pounds, or twenty-five pounds. I have no idea about how many people would get the goods out of the car. There is a lot of goods in it, but it all depends how large the orders people have got.

Q. About how many people did you take goods for at any one time from a car?

A. Probably fifteen or twenty people in one load. I should think a car would stay here, ordinarily about five days. I would haul three, or four, or five loads a day and at times I delivered
19 about three days in one delivery. Possibly I would deliver to fifty or sixty persons out of a car. Farmers would come in and get their goods out of a car. I delivered to people in the city.

Q. Would there be anything about any packages indicating who owned it, Smith, Jones or Brown? How would you know which package belonged to Smith, Brown, O'Hara, Cavanaugh or Bridgman?

A. Whenever Mr. Stewart gives me a bill like those bills are and says how many pounds he hands me, a hundred pounds of sugar, I know a hundred pounds is for that man.

Q. When the sugar was in the car before he handed it to you, if I went in there there would be nothing about that to tell me whose sugar that was.

A. I don't know, but I don't believe so.

Q. There would be no names on it?

A. I don't believe there is, but I could not absolutely say whether it was so or not. I paid no attention to that.

Recross-examination by Mr. BRIDGMAN:

Mr. Stewart gave me a paper when he gave me those goods.

Q. An invoice they call it?

—. Yes, sir, that is those bills and another paper, a slip, a kind of list of all the invoices that I took. I have some of those with me.

Q. For instance, he would give you, in a bill like that (Showing a paper,) he would give you those articles, would he not, check off according to that bill?

A. He gave a bill like this to check off. It is a bill head like this or larger. Here is only one article on and there he would probably have a whole sheet full, whatever the amount of the order was. It would be an exact duplicate only in a bill form. I took one of those with every delivery. Mr. Stewart checks off the goods off the same paper on to my wagon, and I check it off, I hand it to the people in the same way.

Mr. BRIDGMAN: The paper was similar to this:

"Telephone, Yard, 821. Chicago, Illinois. Gus Ergang, bought of D. J. Stewart, Wholesale Grocer, 4424 Union Avenue. Terms —. Specialties Badger Flour, Baking Powder, Extracts, Spices." On the one offered as an illustration appears, "Two barrels flour. Paid. D. J."

Q. Were the articles that you took and delivered under those orders marked in any way to correspond with every bill.

A. Yes, sir, the bill will say one barrel of flour or five pounds coffee, and the mark five pounds of coffee, or name, and the sort of coffee be marked on the package.

Q. Each package, for instance if coffee, it would be marked the kind of coffee and five pounds?

A. For instance "special coffee," or "extra special" or so on, whatever the sort of coffee was.

Q. Put up in packages.

A. Put up in packages and wrapped up and tied up.

Q. Delivered in packages to you from the car?

A. Yes, sir.

Redirect examination by Mr. O'HARA:

I believe I have delivered some fish, canned salmon and sardines. They were in tin boxes, the way they sell them at grocery stores.

Q. If a man's order called for half a dozen cans of salmon he passed you out half a dozen cans?

A. He handed me half a dozen cans of salmon.

Q. When the canned goods came, if Peter Jones had ordered five cans of tomatoes, and he had lots of them there, he would not have Peter Jones' packages of cans done up in a package in the car?

A. No, sir.

Q. He would take five cans out of a box and pass them to you?
A. Yes, sir.
Mr. BRIDGMAN: And check with the bill?
A. Yes, sir.

21 (By Mr. O'HARA:)

Q. There were some cases, in which, I presume, either the people had left the city or were absent when you got around to deliver the goods so you could not deliver them? I suppose you had instances of that kind?
A. Yes, sir.
Q. What would become of those goods?

Mr. BRIDGMAN: I object to that for the reasons heretofore stated and that he is not charged with anything, except the soliciting of orders.
The COURT: The objection is over-ruled. It can come in. These questions I will hear you on hereafter.
Note an exception.

Q. What did you do with those goods?
A. I took them back to the car. I bring the bill of goods back and tell Mr. Stewart the circumstances, those people were not home, or had left town and I return the goods to him. I don't know what become of them afterwards.

CHARLES PAGEL, a witness sworn for the people testified as follows:
I live in St. Joseph Township. Am a farmer and have lived there about twenty or twenty-five years. I know Mr. Stewart. Have known him for six or seven years. I first met him, he came to my yard for business. He wanted me to buy some goods.
Q. Did you order some?
A. Yes, sir, and he would write it down.
Q. And when would you get the goods? How long after that?
A. About a month, sometimes three months. I couldn't say for sure I got them at St. Joseph here, at the depot down there, on the railroad tracks out of the freight car. Mr. Stewart would be there.
Q. Did he take an order from you the lat-er part of July or August, a year ago?

22 A. That I don't know. It was a little later I think, or a little earlier, I couldn't say for sure.

Q. How many orders did he take from you in 1909?
A. I take some every year, I don't know how many times. He is over here two or three times a year. Mr. Stewart takes the order when he is over here.
Q. Then when he comes over again, some months afterwards, he brings the goods?
A. Yes, sir.
Q. Do you know what you ordered from him a year ago last summer?
A. I ordered flour. I couldn't say for sure how many barrels it was. I think close to five or six barrels.

Q. What else did you order?
A. That is all I know, just flour.

Cross-examination by Mr. BRIDGMAN:

Q. Where were those goods coming from, do you know?
A. Yes, from Chicago.
Q. Was he going to bring the goods to you from Chicago?
A. He send them up in the car, and I have to get them myself with a team, at the car.
Q. Don't you know where he is doing business? In Chicago, didn't he tell you so?
A. He tell me so, and do some business.
Q. That he did business in Chicago?
A. Well, that is what I couldn't say for sure. I wasn't home then. My wife gave him the order.
Q. You know he had sent goods from Chicago different times before, did you not?
A. Yes, I know that.
Q. You knew, didn't you, that he sent the goods that he sold here from Chicago, by railroad in a car?
A. Yes, I know that, but I couldn't——
Q. (Interrupting.) You know that, don't you?
A. Yes, sir.
23 Q. He told you he was taking orders to be sent in one or two months from that time to you, you understood that.
A. Yes, sir.
Q. That he would take the order and in one or two months he would send the stuff from Chicago?
A. Yes, sir.
Q. That is what you understood, wasn't it?
A. Yes, sir, the goods were delivered to me just as they were ordered in the package, just as I expected.

Redirect examination by Mr. O'HARA:

Q. He would take an order and you knew where to come down here, to some car and get the goods?
A. Yes.
Q. And two or three days or a week before the car got here, he, Stewart, would send a postal card or letter telling you that such a day, "my car will be in St. Joseph."
A. Yes. I keep the card at home, I think it shows pay for my stuff.

PAUL REMUS, being sworn on behalf of the People, testified:
I live 1411 Morton Avenue, St. Joseph. I have lived here about seven years. I know Mr. Stewart. I first got acquainted with him when he came to my place to take an order for goods in the grocery line. I gave the order. Two or three months, possibly less time than that, I would get the goods. The drayman would simply come to the house and deliver the goods. In country places they ask them to

come in. I was a witness below. He took an order from me in 1909, but I could not say whether it was at that time. I think there was one for 1909 and two for this year. That, (Producing a paper) is the order of 1909.

Q. That is not an order.

A. That is a bill.

24 Q. Have you got a duplicate of the order?

A. I have not.

Mr. O'HARA: I offer the bill. There is no date on it, but you know that is 1909?

A. That is 1909, yes, sir.

Mr. BRIDGMAN: Subject to all objections heretofore made. I object to those bills.

The COURT: The same ruling.

Exception noted.

Mr. O'HARA: The same printed matter exactly as the printed bill head, and it is "Paul Remus, 907 Michigan Avenue, St. Joseph. Barrel Badger flour, $6. Doz. Wizard soap 35 cents, one-half barrel of Stewart's soap $1.50, 50 pounds of G. sugar $2.75.

The WITNESS: It is a box of soap, instead of a barrel.

Mr. O'HARA: "Total of $10.80. Paul Remus. (Sign here.)"

Q. That shows you got the goods?

A. Yes, sir, I got the goods.

Q. Was there anything on your packages to indicate that those packages were put up for you?

A. Not that I know of. I don't think there was. I never went down to the car. My stuff was brought to the house and if we had change at the house, my wife paid it and if we didn't, Mr. Stewart in three or four days would come and collect the money himself.

The COURT: Who paid for the delivery?

A. I had nothing to do with that. I suppose Mr. Stewart settled for that.

Cross-examination by Mr. BRIDGMAN:

Q. You got, I suppose, the goods as you ordered them?

A. Yes, sir, in packages just as I expected them. Soap was in a box, flour in a sack. The soap was marked "Stewart's soap."

25 My wife gave him the order. I don't know whether I was there at that time or not, but I have been to the house when he was there taking an order.

Q. Do you know where he was doing business?

A. Yes, sir.

Q. Where?

A. In Chicago, that is what I heard.

Q. He told you so himself, didn't he?

A. Yes, sir.

Q. Those goods for which he was taking the order, you understood were to be sent to you from Chicago?

A. Yes, sir.

Q. That was the understanding in order?

A. Yes, sir.
Q. Two or three months, more or less, they came to you?
A. Yes, sir, sometimes it would be earlier or later. I paid for the goods after I got them. I never paid for the goods before I got them.
Q. You know they came from Chicago here?
A. I know they came from Chicago here. It seems to me we have got some stuff from the boat, that is a special order.
Q. That was a special order from Chicago?
A. Yes, sir. Once Mr. Hackstaff took orders up, I think for Mr. Stewart and I was short one time and I think one barrel of flour I got through the Graham boat from Chicago. The drayman brought it up from the boat. It was directed to me.

AUGUST KUSHELL, being duly sworn on behalf of the people testified:
I live at 505 Morton Avenue, in the City of St. Joseph. Am a bricklayer and know Mr. Stewart. I have known Mr. Stewart seven or eight years. I have done business with him. I have bought flour from him. I cannot remember when I bought it—in the spring or fall, but I bought it from him. He first came to the house and got the order and sometime afterwards a drayman
26 brought the goods up and afterwards he got his pay. I don't remember how long it was between the time I gave the order and the time the drayman brought the goods up.

Cross-examination by Mr. BRIDGMAN:

Q. Do you know where Mr. Stewart's home is, where he lives when he is at home?
A. His home is in Chicago, I hear.
Q. Do you know where Mr. Stewart lives.
A. He told me, that when I was out of stuff if I telephoned up to him, or give him a notice on a card he would send me stuff when I was out of flour, he wanted to send me extra with express, or anything I wanted. I gave him an order and he sent the flour to me from Chicago.
Q. From Chicago?
A. That is what I know, what he told me. I always got just what I ordered.
Q. You got or expected to get it from Chicago?
A. Yes, sir,
Q. He told you so when he sold it to you?
A. He told me he lived in Chicago and got his store in Chicago and he would send it from Chicago.
Q. What kind of flour was that?
A. White flour, best flour, what I pay $7.00 here for, I pay $5.50. I wish we had more men like Mr. Stewart in that kind of business. I have to pay $7.00 over here. Makes me a $1.50 cheaper as I buy it here. A poor man has a right to look after his living.

summer. I gave him the orders. I ordered some groceries from Mr. Stewart. I could not state exactly what time of the year that was. He generally came in the spring and in the fall. I would get the goods about six or eight weeks after I gave him the order.

Mr. Stewart came out to our place with a horse and buggy.

30 Mr. O'HARA: Some people have got automobiles and airships, horse and buggy and some people walk?

A. No, he didn't walk. He would go around the entire neighborhood there.

Cross-examination by Mr. BRIDGMAN:

I know Mr. Stewart.

Q. When Mr. Stewart would take orders you knew he was going to send the stuff to you from Chicago?

A. Yes, sir, and he did send it. I expected to receive the stuff in about two months after I gave him the order. When the stuff got here he sent a postal card or telephoned. My husband went down and got what was ordered. If I ordered five pounds of anything it would be done up in a package of five pounds.

Mrs. NANCY A. HARNER, being duly sworn on behalf of the people testified as follows:

Examined by Mr. O'HARA:

I live in Royalton Township. Am the wife of William D. —— who is sick and not able to be down. I have known Mr. Stewart for four or five years. I have got groceries of him and flour and all such stuff.

Q. He drops around to your place?

A. Sure he does.

Q. Takes your order?

A. Sure.

Q. And subsequently fills it?

A. He certainly fills my orders to a 'T.' My husband is a farmer.

Q. When you sell eggs do you take cash?

A. We do if we don't take groceries for them.

Q. When I used to sell we used to take it out in trade.

A. I should think you would in this town.

31 Q. You don't refer to St. Joe? You mean Benton Harbor?

A. Oh, no.

Q. St. Joseph?

A. I mean St. Joseph.

Mr. O'HARA: I thought we had the nicest little city on earth.

The WITNESS: I am glad you think so. Everybody don't.

Mr. O'HARA: The Judge thinks Niles is a better town. Brother Andrews things Benton Harbor is a great town.

The WITNESS: I think it is a good deal better than St. Joe. I would give the orders and they would be filled, and I would be apprised of it. I generally come and get them myself. I go to

Stevensville sometimes and sometimes to the depot, in the city of St. Joe. He would run his car into Stevensville.

Q. What is your grievance against St. Joseph?

A. It isn't best to tell always. I buy flour for $5.50 or $5.60 from Stewart and I come here and get twenty-five pounds of flour and they charge me one dollar. It is a good deal of a grievance, ain't it?

Q. Twenty-five pounds of flour?

A. Mr. Weber charged me a dollar for twenty-five pounds.

Mr. O'HARA: That is Double A. Double X.

A. I guess it must have been, but it didn't come up to Stewart's flour then.

Cross-examination by Mr. BRIDGMAN:

I think if I ain't mistaken, I bought a sack of flour down there about the third day of July. I wasn't there to give my order in the spring and I heard he had flour there and I went down to see if he wouldn't sell me a sack of flour. I have ordered from him before and after. Every time he comes to our house I order from
32 him. I know where his place of business was. I cannot tell you the street, but I have been to his place of business this fall, in Chicago. I know he lives in Chicago and runs a wholesale grocery store there. When I gave an order I expected it would be filled from Chicago.

Q. And he would send it to you.

A. Yes, sir.

People rest.

The defendant, by his attorney, prays the court to instruct the jury to return a verdict of not guilty, for the reasons following:

1st. That the complaint and warrant sets forth no crime known to the laws of the State of Michigan.

2nd. The complaint and warrant do not negative or show that the defendant was not selling his own work or production by sample nor that he was not peddling meat or fish; nor that he was not a merchant who was conducting a regularly established mercantile business in the County of Berrien for at least one year previous; nor that he was not a wholesale merchant selling by sample to dealers.

3rd. That the law of the State of Michigan mentioned in the complaint and warrant in this case, and upon which such complaint and warrant is made, is unconstitutional for the following reasons: (1st.) That such law is in violation of Section 8 of Article I of the Constitution of the United States, which vests in the courts of the United States the powers to regulate commerce between the states; and as well in violation of Section 2 of Article 4 of such constitution, which provides that citizens of each state shall be entitled to all privileges and immunities of citizens in the several states. And also that such law is in violation of article I of the 14th amend-
33 ment to the constitution of the United States, which provides that no state shall make or enforce any law which

abridges the privileges or immunities of the citizens of the United States, nor deny to any person the equal protection of the laws. Because such law discriminates against the citizens of different states, and is in retraint of interstate commerce in this, that such law expressly exempts from its operation any merchant who has been conducting a regularly established mercantile business in any county of the state for a period of at least one year previous; and also that it provides that any wholesale merchant shall not be prevented by anything herein contained from selling to dealers by sample without any license.

4th. Because no proceedings were had, as appears by the complaint and warrant in this case, and such complaint and warrant were not issued until after sixty days from the time in which the offense mentioned in such warrant and complaint *were* alleged to have been committed.

5th. That the respondent was at the time of his arrest engaged in interstate commerce as appears by the evidence.

6th. That at the time that the alleged acts complained of were committed by the defendant, he was at the time lawfully engaged in interstate commerce, and not liable to arrest under the complaint and warrant in this case.

7th. And that at the time the said defendant, David J. Stewart, is charged with having solicited by sample orders for grocery-, flour, etc., from various people in Berrien County, he was then and there a resident of the State of Illinois, and engaged as a merchant in the City of Chicago in said state, selling goods in the City of Chicago; and as such merchant, he was at the time alleged in the complaint and warrant, engaged in selling by sample groceries, flour, etc., to be afterwards delivered to the several parties, as solicited, from his store and wholesale department in the City of Chicago; and
34 as such merchant he was not liable to pay to the State of Michigan a license tax under the law mentioned in the complaint and warrant in this case.

8th. And that the complaint and warrant are indefinite, and do not state, neither states who was solicited, or what persons were solicited, nor what goods, wares and merchandise specifically were solicited from any person or persons.

The COURT: The motion is denied.

Mr. BRIDGMAN: Note an exception.

Defense.

HARVEY STEWART, being duly sworn in behalf of the defendant, testified as follows:

Examined by Mr. BRIDGMAN:

My name is Harvey S. Stewart. I live in Chicago and am acquainted with the respondent, David J. Stewart. David J. Stewart lives at 4424 Union Avenue, Chicago, and is engaged there at 4424 Union Avenue in the wholesale and retail grocery business. I am

his son and have been connected with him in business for four and one-half years, and was so connected with him in that capacity during the year 1909. I was clerk and driver.

Q. During the year 1909 did he sell from Chicago, any goods in Michigan?

A. Yes, sir.

Q. How were those goods sold?

A. Some orders came in by mail; others sent in by himself.

Q. Ordered?

A. Yes, sir.

Q. Were those goods forwarded in accordance with the orders received?

A. Yes, sir.

35 Q. Do you recollect during the year 1909 of your having sent any cars consigned to Mr. Stewart himself in Michigan?

A. Yes, sir.

Q. How were those sent?

A. Directed to him, the cars shipped direct to him. I had the care of the loading of what was shipped from the house in Michigan.

Q. On those cars were any goods shipped, in those cars consigned to him, that had not been previously ordered by private parties in Michigan.

A. No, sir.

The COURT: Just tell the jury what you mean by the orders?

A. Go around and solicit and take the orders, and they were sent in to the house, and the goods put up and forwarded.

Q. The Court means what you mean by private parties.

A. From the consumer.

Q. You mean to say that you received the order from the private consumer?

A. They were taken by my father generally and sent in,—taken from the consumer by my father and sent in to the house and forwarded to me.

Q. I call your attention to three papers marked respect*fully*, Exhibits A, B and C. (Showing the witness papers.) What are those?

A. Duplicates of original orders.

Q. Were the goods shipped in accordance with such orders?

A. Yes, sir.

Q. Were any goods shipped in any of those cars except such as there was an order similar in method and kind to the ones you have got there?

A. No, sir.

Q. The Court says how was that car load loaded and how was it shipped? State in your own way?

A. All I know about it is what was shipped from the house and loaded in the car, the groceries.

The COURT: Were there any goods shipped not from the house?

A. Yes, sir.

36 Q. What was not shipped from the house?

A. Flour was not shipped from the house. Everything else

except the flour was shipped from the house. I had care of the loading.

Mr. BRIDGMAN: I speak of a car sent to St. Joseph in 1909.

A. I loaded that myself. One car of groceries was shipped to St. Joseph in 1909. Two cars of groceries were shipped at different times between three and four months apart.

Q. The flour you mentioned was not shipped in the same car with the groceries?

A. No, sir.

Q. Where was that car of flour shipped from?

A. From the mill direct.

Q. In filling that car you may describe how the car was filled, how the groceries are put up, and the markings that are put on the several packages. Confine it to the last year, 1909.

A. The orders were sent in to me by mail, generally. I took the orders as they came in and listed them, numbered them up to a certain point, and I take the orders and go through them, getting the separate items off so it would be easier for us to put them up, and mark each package according to what was in it, so as to be identified by the order when it was delivered. The packages were taken and placed in boxes or barrels, and packed and stored there until the time to deliver, put in the car; hauled to the depot and placed in the car. Packed by myself generally in the car.

The COURT: Were they packed in boxes, or how, your groceries, sugar and tea and coffee? Each packed by itself or packed in some boxes?

A. The sugar was packed in the original packages. Other packages packed in boxes and barrels.

Q. Sugar in the original packages?

A. Yes, sir.

Q. How was it with other goods? In other words, was every package of five pounds and ten pounds put up separately in a separate package?

A. Yes, sir.

37 The COURT: You took a five pound package and put it with other packages in a box, did you not?

A. Yes, sir.

Q. That is it was not kept separately by itself, but put in with other things in a box.

A. Yes.

Mr. O'HARA: All coffees put in one box?

A. Yes, sir.

Q. Twenty different packages of five pound packages, that is all put in one box and nailed up?

A. As near as we could together we placed them all in one box.

Q. The packages themselves were they, or were they not weighed and put up in packages in Chicago?

A. Yes, sir.

Q. There was not any coffee or tea or anything of that kind, in bulk, to be measured out after it got to St. Joe?

A. No, sir.

Q. Had Mr. Stewart, your father, any place of business in Michigan where he had a stand or store or anything of that kind? In 1909?

A. Not that I know of. I live with my father in Chicago and have lived with him all my life. I am closely associated with him in business. My business with him was clerk in the store and driver. I have been in Michigan before.

Mr. BRIDGMAN: That there may be no misapprehension, I offer in evidence Exhibits A, B and C.

Those orders were in the handwriting of my father, David J. Stewart.

Q. There are memorandas in pencil mark. Who put those on, and what do they indicate?

A. Some are by myself.

Q. What do they indicate, what do those marks indicate? For instance here is a mark 'B' (Indicating 'B').

A. That shows the order has been filled and invoice made for it.

38 Q. What do you mean by invoice made?

A. Make out an invoice to be delivered to the party.

Q. To what party?

A. To the party that the goods are to be delivered to in St. Joe. The other figures are put on in the office, I suppose.

Cross-examination by Mr. O'HARA:

Q. At what time would that writing be placed there?

A. When he took the order.

Q. When would you see these first?

A. Probably two days after it was taken. I would get it back by mail.

Q. Where was Mr. Stewart all this time?

A. In Michigan.

Q. What was he doing in Michigan all this time?

A. To my knowledge taking orders such as these, in different parts of the state.

Q. Has Mr. Stewart been doing business in this county?

A. Yes, sir. I don't know what other counties they are in. I don't know whether you call them cities, Baroda, Stevensville and Bridgman. He has taken orders out of Bridgman, Baroda and Stevensville. At Niles orders were sent in by mail.

Q. He has been spending pretty near the whole year in this county doing this kind of business?

A. As far as I know.

Q. What is he doing in Michigan?

A. I don't know what he does in Michigan.

Q. How often does your father come home?

A. Sometimes once a week, sometimes once a month, and sometimes once in three months. I don't know where he is only when he writes. He writes from different towns, St. Joe, Benton Harbor, Stevensville, Baroda, Bridgman, Paw Paw, and Lawrence.

39 Q. Has he got any other kind of business except taking orders in Michigan?
A. Not that I know of.
Q. He ain't running a farm or anything?
A. No, sir.
Q. Or store?
A. No, sir, not that I know of.
Q. How big a store is it that you have got in Chicago?
A. Our house is, I think, 63 x 28. The store covers the ground floor dimensions. We live upstairs over it and the basement is underneath, and there are three rooms in the store. The store is on the ground floor. The length of the store and the width of it is as near as I know, 63 x 28 feet. The store is divided into three parts by a full partition having doorways. The building is two stories and a basement the full size of the ground floor. In the year 1909 four clerks were employed in that store, I think. There have been four this year and four last year as near as I know.
Q. Who is the manager?
A. My uncle has charge of it while I am away and while my father is away.
Q. You are not the principal person when the father is away?
A. Not altogether.
Q. Are you or are you not? Who manages the store? The main squeeze, or main guy?

Mr. BRIDGMAN: I object to that question?

Q. Who is the captain there, the manager?
Mr. BRIDGMAN: He has already said his uncle was when his father was away.
Q. Who is the person in charge?
A. My uncle generally has charge. When my uncle is not the manager, I am, that is when he is not there. My uncle clerks in the store. He is bookkeeper and clerk. Other clerks in the store doing clerical work, putting up orders and picking them out. I mean measuring out.
Q. When your uncle was manager of the store how did this correspondence come to you, if he was the manager?
A. Some was mailed to me with my name, and others to
40 him,—my uncle and my mother.
Q. Who owns that store?
A. My father. My uncle has no interest in it, but he works there.
The COURT: Do you do a retail business there?
A. Yes, sir. Sell to people in Chicago.
Q. Do you do a wholesale business?
A. Yes, sir. Sell to dealers in the city, groceries.
Q. You have got a little store of that size and you mean to say you wholesale to dealers in Chicago?
A. I do.
Q. What dealers?

A. South side. I mean grocery stores, they sell the consumer and e sell to them.
Q. Name some of those dealers?
A. Lebold Sterling. Place of business is near Fifty-third street n Emerald. They are in a basement.
Q. What do you sell them?
A. Butter and eggs.

Mr. BRIDGMAN: What is the object of that cross examination?
Mr. O'HARA: I will tell the jury when I get through with this examination.

Q. What else do you sell dealers except butter and eggs?
A. Sugar and groceries in general.
Q. Who do you sell sugar to?
A. I don't know exactly who they sell to.
Q. What little grocer in Chicago would buy of you sugar?
A. I don't know.
Q. Name some one who does buy sugar of you, some grocer in Chicago.
A. Let me tell you something, I don't do much delivering from the house. I go down town, I don't know much about what they deliver from the house, by delivering from the wagon.
Q. You don't know about wholesaling sugar to the grocers?
A. Some things have gone out and I have delivered some, but I don't know who to now. I can't remember. We buy from a wholesaler in town.
41 Q. You mean to tell us while you buy goods from a wholesaler in town, you wholesale to other people in town?
A. I do. All those goods we sell come to our store.
Q. How many cars of stuff from your wholesale place came to St. Joseph in 1909?
A. There were two for St. Joe and Benton Harbor. Groceries from the house during that year.
The COURT: Were there cars sent besides those?
A. Yes, sir, by our firm from different points of shipment. From St. Louis and South Chicago.
Q. How did they happen to come from there?
A. B-ought flour.
Q. Is that all that came in the cars?
A. Flour and feed.
Q. The flour that would come here to St. Joseph wouldn't come in the same car——
A. (Interrupting.) No. sir.
Q. That the groceries did?
A. No.
Q. Would it come at the same time?
A. As far as I know it did, but I don't know.
Q. Would this flour be marked consigned to anybody?
A. To my father. I think it came in sacks, 98 pounds generally. Sometimes 25 and 50 pounds. In other words there would be a barrel of flour come put up in various kinds of sacks. This flour

come from South Chicago and St. Louis, so far as I know. It was white flour, wheat flour. I don't know whether or not there is any difference in the price of winter and spring wheat flour.

Q. Who made out the bills for the flour, invoices of the flour?

A. For the flour? The mill.

Q. But for the man who is going to get it? Supposing I was one of your father's customers, and I had ordered a couple of hundred of flour, who would make out that invoice to me?

A. I did.

42 Q. Then you knew about the price, did you not?

A. Yes, sir.

Q. You knew something about the prices of the various kinds of flour?

A. Just the selling price.

Q. What is the name of the flour?

A. Badger Flour.

Q. You don't keep any flour in stock in the store?

A. Yes, sir, it comes in from South Chicago generally. So far as I know it was manufactured there. We received some goods in that store from various places outside of wholesale merchants from the east and west. Some from Massachusetts and some from farther south.

Q. From what kind of houses did you get the flour from the south and the east?

A. Manufacturers.

Mr. O'HARA: I will put it right to you. And just think a minute before you answer. You know once in a while a grocer in a small place, or in the City of Chicago, goes out of business, you know that, don't you?

A. Yes, sir.

Q. And at the time of going out of business he has a stock on hand.

A. Yes, sir.

Q. It may be three months old, six months old, and sometimes may have been there for twenty-five years, if he was in business that length of time,—you know that?

A. Yes, sir.

Q. You handle some of those stocks once in a while, do you not?

Mr. BRIDGMAN: We object to that. Is it material to the prosecution where he got the goods?

Mr. O'HARA: We ought to protect the citizens of Berrien County.

The COURT: Of course I don't want to say much just now. What this will lead to, I don't know. I can see perhaps it might have some bearing on the question of doing business. The objection is overruled.

Mr. BRIDGMAN: Note an exception.

43 The WITNESS: You mean the firms that went out of business?

Q. Yes.

A. Not that I know of.

Mr. O'HARA: You nodded and then you looked—you nodded approvingly and then you looked.

Mr. BRIDGMAN: Nonsense, moonshine and imagination.

The WITNESS: I shook my head, that's all.

Q. What did you do that for?

A. Thinking——

Q. (Interrupting.) Why was it necessary to look in the direction of your father's attorney?

A. I didn't see him.

Mr. O'HARA: I don't know whether you did or not.

The WITNESS: I can say I didn't.

Q. Was it necessary to look in his direction? You say you never handled any stocks of merchants who went out of business.

A. Not that I know of.

Q. Did your folks ever buy up any such stock?

A. Not lately.

Q. Answer it.

A. Hain't I got a chance to think?

Q. When did you last buy a stock?

A. Not in the last ten years.

Q. How old are you.

A. Twenty-two.

Q. You don't know much of what happened ten years ago in business, do you?

A. I was there.

Q. You were in the same business then you are now?

A. My father was.

Q. Were you?

A. Going to school.

Q. Now, when those goods came over here and your father could not dispose of them to the people that had ordered them, what would he do with the goods?

A. I don't know.

Q. Did he ever tell you?

A. No, sir.

44 Q. Did you ever inquire?

A. I don't know anything about what happens over here with the orders.

Q. Did any goods ever come back?

A. Yes, sir.

Q. How did that happen?

A. Sent back to the house.

Q. By whom?

A. By my father, sometimes.

Q. What for?

A. To be returned to the house.

Q. What do the words on those orders 'To D. Leach' mean?

A. Some stuff shipped to Leach.

Q. Well, now, this question about that 'D. Leach' what does that mean?

A. Those goods was shipped to Leach and he was to deliver them, for our house.
Q. Those goods were not meant for Leach at all?
A. No, sir.
Q. They were meant for the people whose names appear there.
A. Yes, sir.
Q. Those goods were shipped to the drayman Leach and he was to deliver them for your house?
A. Yes, sir.
Q. And the goods when he didn't deliver them he sometimes kept them in stock?
A. I don't know what he did with them.
Q. When did you last have a car in St. Joseph?
A. In the fall.
Q. Don't you know that Mr. Leach in the last few days, this gentlemen, the drayman, who is mentioned here, has been delivering flour?
A. I don't.
Q. Or groceries?
A. Only yesterday, I think it was. He was delivering yesterday.
Q. Where did he get those groceries?
A. Benton Harbor.
Q. Where did he get them from?
A. From a storeroom.
Q. What storeroom?
A. I don't know.
45 Q. Whose goods was he delivering yesterday?
A. My father's.
Q. Were they stored in Benton Harbor?
A. Yes, sir.
Q. Do you mean to tell this jury you don't know where in Benton Harbor?
A. I don't. I am a stranger and don't know where it is.
Q. Did you see the place?
A. I did.
Q. How big a place is it?
A. Probably 10 x 12, or larger.
Q. How long has your father had that place?
A. I don't know.
Q. You know he has a storeroom in Michigan?
A. I do now when I think of it, yes, sir.
Q. How long has he had a storeroom?
A. I don't know.
Q. Whereabout- is it in Benton Harbor?
A. I don't know.
Q. What buildings are near it?
A. Houses is all I know.
Q. Do you know where the principal corner in Benton Harbor is?
A. No, I don't.
Q. Do you know where the bank is diagonally across from the Hotel Benton.

A. I think I do.
Q. How far from that place is the storeroom of your father's?
A. I cannot state exactly. Probably two or three blocks, but I don't know in which direction.
Q. How big a storeroom is it?
A. Probably ten by twelve on the ground floor. It is a frame building and faces the street.
Q. What kind of business was near it?
A. All I saw was houses that I can remember.
Q. Is it a building entirely separate from a dwelling house, ain't it?
A. I think it is.
46 Q. What is the purpose of that store in Benton Harbor?
A. I don't know.
The COURT: Are there any goods there now?
A. Yes, sir.
Q. What kind of goods are they?
A. Flour and groceries.
Q. Same as on those bills?
A. Yes, sir.
Q. Same general character, I mean.
A. Yes, sir.
Q. About how much goods were in that store yesterday, in dollars and cents?
A. I can't estimate that.
Q. Practically? Whether ten dollars' worth, or a few hundred dollars' worth?
A. Probably $100.00, I can't say for sure.
Q. How did you find it? You went with your father who took you out there?
A. Yes, sir.
Q. Who has charge of that store?
A. Nobody did.

Mr. BRIDGEMAN: Storeroom, he says. He doesn't say it is a store. There is a difference between a store and storeroom.

Q. It is a place where goods are stored in there?
A. Yes sir.
Q. Here appears a name, to whom shipped? 'D. Leach.' Who was he, a drayman?
A. Yes, sir.
Q. It means goods would be shipped to D. Leach and he was to deliver to the different persons named?
A. Yes, sir. It was one of Leach's men who delivered those goods yesterday and delivered on those orders.
Q. The goods that were over at Benton Harbor were not shipped to D. Leach?
A. I don't know who they were shipped to.
Q. Do you make in Chicago, when you are getting ready to ship goods, do you make an invoice, a statement?
A. Yes, sir.

Q. Are the packages that are put up, filling these orders,
47 marked to correspond with the invoice?

A. Yes, sir. That invoice is sent over here. The invoice was sent to whoever was to deliver the goods over here.

JUROR: Can you give us any idea of the value of the stock you carry in the wholesale house?

A. No, I can't just now.

Q. Approximately, something near it.

A. Probably three or four thousand dollars.

Q. And do you know whether or not goods are delivered from that invoice to the different parties?

A. As far as I know they are.

Thereupon the Council for the defendant requested the Court to instruct the jury as follows:

STATE OF MICHIGAN:

The Circuit Court for the County of Berrien.

THE PEOPLE OF THE STATE OF MICHIGAN
vs.
DAVID J. STEWART, Defendant.

Refused. Now comes the above named defendant, by George W. Bridgman his attorney, and prays the Court to instruct the jury to return a verdict of not guilty, for the reason that at the time when the alleged acts complained of were committed by the defendant, he was at the time lawfully engaged in interstate commerce and not liable to arrest under the complaint and warrant in this cause. Which said request the Court refused to give and marked against the same "Refused."

2.

Refused. At the time the said defendant, David J. Stewart, charged with having solicited by sample, orders for groceries,
48 flour, etc., from various people in Berrien County he was then and there a resident of the State of Illinois and engaged as a merchant in the City of Chicago and said State of Illinois, selling goods in said City of Chicago, and as such merchant he was at the time alleged in complaint and warrant, engaged in selling by sample groceries, flour, etc., to be afterwards delivered to the several parties so solicited from his store and wholesale department in the City of Chicago; and as such merchant he was not liable to pay to the State of Michigan a license tax under the law mentioned in the complaint and warrant in this case. Which said request the Court refused to give and marked against the same "Refused."

3.

Refused. The complaint and warrant do not negative or show that the defendant was not selling his own work or production by

sample, nor that he was not a peddler of meat or fish, or that he was not a merchant who was conducting a regularly established mercantile business, in the County of Berrien, for at least one year previous, nor that he was not a wholesale merchant selling to dealers by sample. Which said request the Court refused to give and marked against the same "Refused."

4.

Refused. That the law of the State of Michigan named in the warrant and complaint in this cause, and upon which such complaint and warrant is made, is unconstitutional, for the following reasons:

A. That such law is in violation of § 8, Art. 1 of Constitution of the United States, which vests in the Congress of the United States the power to regulate commerce between the States. And as well in violation of § 2, of Art. 4 of such constitution which provides that citizens of each State shall be entitled to all the privileges and
49 immunities of citizens in the several States, and also that such law is in violation of Art. 1 of the 14th Amendment to the Constitution of the United States which provides that no State shall make or enforce any law which abridges the privileges or immunities of citizens of the United States nor deny to any person the equal protection of the laws.

B. Because such law discriminates against the citizens of different states and is in restraint of interstate commerce in this, that such law expressly exempts from its operation any merchant who has been conducting a regularly established mercantile business in any county of the state, for a period of at least one year previous, and also provides that any wholesale merchant shall not be prevented by anything herein contained from selling to dealers by sample without any license. Which said request the Court refused to give and marked against the same "Refused."

5.

Refused. Because no proceedings were had and the complaint and warrant in this case was not issued until after sixty days from the time in which the offense mentioned in such warrant and complaint had been committed. Which said request the Court refused to give and marked against the same "Refused."

6.

Refused. Because the complaint and warrant attempt to charge the respondent in the words of the statute—but the complaint is silent as to who or what persons were solicited—or what articles any person was solicited to purchase or order. Which said request the Court refused to give and marked against the same "Refused."

GEO. W. BRIDGMAN,
Attorney for Defendant.

50 Thereupon the Court of its own motion instructed the jury as follows:

GENTLEMEN OF THE JURY: There appears to be no particular controversy in this case as to the material facts, so that the questions which arise for consideration in this case are purely questions of law. These questions were argued yesterday and also this morning by counsel on both sides, and I came to a conclusion which I will now state.

The complaint in this case charges the defendant with having travelled from place to place within the County of Berrien and State of Michigan, for the purpose of and taking orders for the purchase of goods, wares and merchandise by sample lists and catalogues, without having then and there obtained a license as a hawker and peddler as required and provided by Act No. 136 of the Compiled Laws of Michigan.

In this case it is claimed by the defendant that he was engaged in interstate commerce and that he was protected by the Interstate Commerce Law.

Now, it is true that a wholesale merchant or grocer, in the City of Chicago for instance, can solicit orders through an agent in this state and he can send an agent here to deliver the goods.

The facts, however, in this case are different. The goods were shipped here in a car consigned to the defendant himself. The goods were never consigned to the man who made the order, and when they got here they were not the goods of the man who made the order because if, any of those men who had made an order had gone down to the car they could not have claimed the goods that were there because they could not be identified. The packages were mixed promiscuously in boxes and there were no names on the packages. Moreover, those goods were not shipped according

51 to the usual course of business, promptly, but there was a delay of some two or three months in the shipment of those goods.

I hold, gentlemen, that there was no sale ever consummated until the goods were actually delivered by the drayman at the house. Ordinarily the sale is consummated at Chicago (where goods are ordered from Chicago) and the sale is consummated the moment they are shipped at the City of Chicago, directed to the consignee. In this case no sale was consummated whatever until the goods were actually delivered at the house.

So I hold, practically, that the car was a mere warehouse or place of doing business by the defendant, and it was there that he distributed the goods as he pleased. For that reason gentlemen, I hold that the defendant comes within the law and that he is what is called a hawker and peddler. I may be wrong about it, but that is my opinion, gentlemen, from the facts and circumstances of the case and from investigation and examination of the authorities and the courts upon these questions.

It is a case of some importance, of course, involving principles relative to hawkers and peddlers.

In this case, as it is only a matter of law, and there are no facts in

dispute, it will be your duty of course, as a matter of form, to follow the direction of the court, I find, gentlemen of the jury, in this case that the defendant, under the evidence and the law, is guilty of the charge. Of course the power is with you, however, to bring in a verdict under the instructions which the court has given you as to the law, and you can retire and select your foreman and bring in your verdict.

52 STATE OF MICHIGAN:

In the Circuit Court for the County of Berrien.

THE PEOPLE OF THE STATE OF MICHIGAN
vs.
DAVID J. STEWART, Defendant.

The defendant and appellant says that in the record and proceedings in above cause there is manifest error in this, to-wit:

(1.)

The Court erred in over-ruling objection of defendant to the introduction of any testimony under the complaint and warrant in this cause as stated in Pages 7 and 8 of this Record.

(2.)

The Court erred in over-ruling objection of defendant to the introduction of any evidence except during the time stated in the warrant and first ten days previous to the 10th day of August A. D. 1909. Page 9.

(3.)

The Court erred in refusing to strike out the answer of witness as to the delivering of goods two years previous to the time stated in the complaint and warrant. Page 9.

(4.)

The Court erred in refusing to strike out the testimony of the witness De Forest Leach concerning the delivery of goods and merchandise, as under the complaint and warrant; the defendant was only charged with taking orders and not with delivering goods. Page 13.

53 (5.)

The Court erred in over-ruling the objection of the defendant to the testimony of Gustav Ergang concerning the delivery of goods as he was only charged with taking orders and not charged with selling and delivering. Page 13.

(6.)

The Court erred in over-ruling objection of defendant — question "How frequently would these orders be taken?" as irrelevant, imma-

terial, and incompetent and that the defendant is only charged with taking orders for the first ten days previous to the 10th day of August, A. D. 1909. Page 16.

(7.)

The Court erred in over-ruling objection of defendant to a purported order given on the 20th day of August, 1909, for the reason that the order purported to have been given after the time stated in the complaint and warrant. Page 17.

(8.)

The Court erred in over-ruling objection of defendant to question asked of Gus Ergang "What would become of those goods?" for reasons heretofore stated and that the defendant is not charged with anything excepting soliciting orders. Page 21.

(9.)

The Court erred in over-ruling objection of defendant to the admission in evidence of the purported several bills and orders without date, simply sometimes during the year 1909. Page 24.

(10.)

The Court erred in over-ruling motion of defendant to
54 take the case from the jury and direct a verdict of "not guilty" for the reasons stated in such Motion found on Pages 32, 33, 34.

(11.)

The Court erred in refusing to instruct the jury as prayed in defendant's request, Number 1.

(12.)

The Court erred in refusing to instruct the jury as prayed in defendant's request Number 2.

(13.)

The Court erred in refusing to instruct the jury as prayed in defendant's request Number 3.

(14.)

The Court erred in refusing to instruct the jury as prayed by defendant in his request Number 4.

(15.)

The Court erred in refusing to instruct the jury as prayed in defendant's request Number 5.

(16.)

The Court erred in refusing to instruct the jury as prayed in defendant's — Number 6.

(17.)

The Court erred in his voluntary charge to the jury wherein he said, "The facts, however, in this case are different. The goods were shipped here in a car consigned to the defendant himself. The goods were never consigned to the man who made the order, and when they got here they were not the goods of the man who
55 made the order, because if any of those men who had made an order had gone down to the car they could not have claimed any goods that were there because they could not be identified. The packages were mixed promiscuously in boxes and there were no names on the packages. Moreover, those goods were not shipped according to the usual course of business, promptly, but there was a delay of some two or three months in the shipment of those goods.

(18.)

The Court erred in that part of his voluntary charge wherein he told the jury, "I hold, gentlemen, that there was no sale ever consummated until the goods were actually delivered by the drayman at the house. Ordinarily the sale is consummated at Chicago (where goods are ordered from Chicago,) and the sale is consummated the moment they are shipped at the City of Chicago, directed to the consignee. In this case no sale was consummated whatever until the goods were actually delivered at the house."

(19.)

The Court erred in his voluntary charge to the jury wherein he stated, "So, I hold, practically, that the car was a mere warehouse or place of doing business by defendant, and it was there that he distributed the goods as he pleased. For that reason, gentlemen, I hold that the defendant comes within the law and that he is what is called a hawker and peddler. I may be wrong about it, but that is my opinion, gentlemen, from the facts and circumstances of the case and from investigation and examination of the authorities and the courts upon these questions."

(20.)

The Court erred in instructing the jury in his voluntary
56 charge as follows: "I find, gentlemen of the jury, in this case, that the defendant, under the evidence and the law, is guilty of the charge. Of course the power is with you, however."

GEO. W. BRIDGMAN,
Attorney for Defendant.

After being absent for a time the jury returned a verdict of Guilty and the defendant was allowed to enter into a bond to await the action of the Supreme Court, before sentence.

Because none of the exceptions so taken upon said trial appear of record, the said Circuit Judge upon request of defendant hath signed this Bill of Exceptions this fourth day of May A. D. 1911, and I

certify that at the time of signing this Bill of Exceptions, the assignment of errors hereto attached and made part of the Bill of Exceptions, were presented to said Circuit Judge together with the Bill of Exceptions. I further certify that the foregoing Bill of Exceptions contains all the material testimony taken upon the trial and that so much of the foregoing testimony as is set out by questions and answers is so set out because a full understanding of the questions involved render- such course necessary.

ORVILLE W. COOLIDGE,
Circuit Judge.

57 EXHIBIT A.

Telephone, Yards 821.

CHICAGO, ILL., —— —, 1910.

Mrs. Gus Ergang, 818 Church Street,

583.

Bought of D. J. Stewart, Wholesale Grocer, 4424 Union Avenue.

Terms: —.

1 Bbl. Flour	$5.70

Pd./D. J. S. G. ERGANG.

EXHIBIT B.

Telephone, Yds. 821.

CHICAGO, ILL., —— —, 190–.

Paul Remus, 907 Michigan Ave., St. Joseph, Mich.,

Bought of D. J. Stewart, Wholesale Grocer, 4424 Union Avenue.

Terms: —.

1 bbl. Badger Flour	$6.00
1 dozen Wizzard Soap	.55
½ box Stewart's Soap	1.50
50 lb. G. Sugar	2.75
	$10.80

Pd./D. J. S. PAUL REMUS.

58 EXHIBIT C.

DATE, 3-17-'10.

Order No. —.
M- Gus Ergang.
Ship to 818 Church Street.
At —.
How Ship —. When —.
Terms: —.

1½	bbls. Flour $5.90	$8.85
20	Cracked Rice	1.00
100	G. Sugar	5.65
	1 10	
3	lb. Chowlts. 10	1.00
1	E. B. & oll tn	.40
2½	B. B. Powder	.60

59 At a Session of the Supreme Court of the State of Michigan, Held at the Supreme Court Room in the Capitol, in the City of Lansing, on the Twenty-third Day of June, in the Year of Our Lord One Thousand Nine Hundred and Eleven.

Present: The Honorable Frank A. Hooker, Joseph B. Moore, Aaron V. McAlvay, Flavius L. Brooke, Charles A. Blair, Justices.

No. 24622.

THE PEOPLE
vs.
DAVID J. STEWART.

This cause coming on to be heard is duly submitted on briefs.

60 The Supreme Court of the State of Michigan.

THE PEOPLE OF THE STATE OF MICHIGAN, Plaintiff,
vs.
DAVID J. STEWART, Defendant.

Opinion.

Before Moore, McAlvay, Brooke, Blair, and Stone, Justices.

STONE, *J.*:

This case is before this Court upon exceptions after conviction, and before sentence. The case originated in Justices' Court. The charge against the respondent, dated the 8th day of November, 1909, was that theretofore, to-wit, on the 1st day of August, 1909, at the County of Berrien, and for ten days preceding that date, one David J.

Stewart did travel from place to place within the County of Berrien, State of Michigan, for the purpose of taking orders for the purchase of goods, wares and merchandise, by sample lists and catalogues, without having then and there obtained a license as a hawker and peddler as required and provided by Chapter 136 of the Compiled Laws of Michigan, of 1897, as amended. The respondent stood mute when arraigned in Justices' Court and upon conviction there, he appealed to the Circuit Court, where the conviction here complained of occurred.

The statute (Sec. 5324, Compiled Laws), under which the respondent was arrested, is as follows:

"No person shall be authorized to travel from place to place within this state, for the purpose of carrying to sell or exposing to sale any goods, wares, or merchandise, or to take orders for the purchase of goods, wares or merchandise, by sample lists or catalogues, unless he shall have obtained a license as a hawker and peddler in the manner hereinafter directed."

By the terms of Sec. 5329, Compiled Laws, a violation of this statute is made a misdemeanor, and it is provided that upon conviction thereof before any Court of competent jurisdiction, the offender shall be punished by a fine of not more than fifty dollars and costs of prosecution, or by imprisonment in the county jail for a period not exceeding three months, or by both such fine and imprisonment, in the discretion of the Court before which the conviction may be had.

Upon the trial in the Circuit Court the evidence tended to show that the respondent had for many years lived in the City of Chicago, Illinois, and had been engaged in the running of a general store there, carrying a general stock of goods amounting to about $3,000 or $4,000. This store appears to have been in charge of respondent's wife, brother and son, while the respondent has spent most of his time for the past several years in Michigan soliciting orders and selling goods, which were shipped into Michigan from his store. He has never obtained nor procured a license as required by the statutes above referred to. The course of business seems to have been that the respondent would ship these goods to St. Joseph in carload lots, and included therein were flour, sugar, coffee, tea, soaps, etc. The sugar was put up in packages of 25, 50 and 100 pounds sizes, and the sugar was packed together. Teas, coffees, flour and many other articles were put up in packages varying in size and placed in the car. Each kind of goods was packed separately; that is, all
61 coffee in one bulk, and all tea in one bulk, etc. This car of goods would be consigned to the respondent himself, and there was no mark of any kind upon any of the goods to identify the goods with any particular order, or any particular person. When the car arrived the respondent would fill therefrom orders, which he claimed to have previously solicited and taken. When an order of goods which had been taken was refused, or for any reason the order of goods was not delivered, the goods would be returned to the car, or placed in a warehouse or storehouse provided by respondent for that purpose. At the time respondent took orders his practice was to

make out a duplicate slip of each order, forwarding one to the Chicago house and retaining the other, and from the slip retained he would fill the various orders from the car. The retained slip seems to have been the only means that respondent had of determining the contents of the various orders or to whom they belonged. The car would be allowed to remain upon the sidetrack at St. Joseph for several days, from which place the delivery of goods would be made, and from which place respondent would sell goods at times. It appeared in the evidence that at the time of the trial in the Circuit Court respondent had a stock of goods amounting to about $100 stored in his warehouse or storehouse in the City of Benton Harbor, from which latter place he would make deliveries for either orders taken or goods sold.

We think the main questions in the case to be considered under the assignments of error, were embraced in objections to all testimony made by respondent's counsel upon the trial. These objections were

(1) That the complaint and warrant set forth no crime known to the laws of the State of Michigan.

(2) That the complaint and warrant do not negative or show that the defendant was not selling his own work or production by sample; nor that he was not peddling meat or fish; nor that he was not a merchant and was conducting a regularly established mercantile business in the County of Berrien for at least one year previous; nor that he was not a wholesale merchant selling by sample to dealers.

(3) That the law of the State of Michigan mentioned in the complaint and warrant in this case, and upon which such complaint and warrant are made, is unconstitutional for the following reasons:

That such law is in violation of Sec. 8, Art. 1 of the Constitution of the United States, which vests in the Congress of the United States the power to regulate commerce between the states; and also in violation of Sec. 2, Art. 4 of such constitution which provides that citizens of each state shall be entitled to all the privileges and immunities of the citizens of the several states; and also that such law is in violation of Art. 1 of the 14th Amendment to the Constitution of the United States, which provides that no state shall make or enforce any law which abridges the privileges or immunities of the citizens of the United States, nor deny to any person the equal protection of the laws.

Because such law discriminates against the citizens of different states and is in restraint of interstate commerce in this, that such law expressly exempts from its operation any merchant who has been conducting a regularly established mercantile business in any county of the state, for a period of at least one year previous; and also provides that any wholesale merchant shall not be prevented by anything therein contained from selling to dealers by sample without any license.

(4) Because no proceedings were had as appears by the complaint and warrant in this case, and such complaint and warrant were not issued until after sixty days from the time in which the offense men-

tioned in such complaint and warrant were alleged to have been committed.

It is also urged in the assignments of error that the court erred in not confining the testimony to transactions occurring within the ten days limited in the complaint and warrant; and that the court erred in its charge to the jury.

The first and second objections urged may be considered together. Perhaps it is sufficient to say that they are not discussed by appellant's counsel in his brief. We think, however, that, under the repeated decisions of this court, the complaint and warrant did state and charge an offense within the statute, and that the exceptions being in a separate section, were not required to be negatived in the complaint and warrant.

(3) Coming to the third point urged by respondent's counsel wherein he contends that the act in question is unconstitutional, and that the case at bar comes within the interstate commerce laws, and is governed by the case of People vs. Bunker, 128 Mich., 160, we are
of opinion that this statute, which has been sustained in
62 numerous cases, is not unconstitutional for the reasons stated; and that, while we recognize the soundness of the doctrine announced in People vs. Bunker, supra, we do not think it governs this case. The facts in that case differ materially from those in the instant case. In the Bunker case respondent was selling knives by sample; and, as stated in the opinion, he did not have with him, or at any place in the state, any stock of knives with which to furnish customers or to fill orders; that every knife for which an order would be taken would be furnished by the firm at Canton and sent to him for delivery.

The further case cited by counsel, that of Brennan vs. Titusville, 153 U. S., 289, cited in the Bunker case, is a case where picture frames were sold only by sample, were manufactured in Illinois, and the goods were sent by express either to the purchaser or to the agent, and the moneys collected and sent to the manufacturer. Here the respondent solicited orders, and shipments were made in carload lots in bulk unidentified, and consigned to the respondent. Refused goods were returned to the car, or a warehouse or storehouse, kept and maintained by respondent, and new orders were filled and goods sold from this place. None of the orders was kept separate, nor was any identification mark placed upon any of the goods to distinguish them, or to indicate that they belonged to any particular order or person; and the sales were really made in this state. Many authorities could be cited holding that the interstate commerce law does not obtain under such circumstances. The decisions of this court have so decisively settled this question that we do not cite other authorities.

People vs. Sawyer, 106 Mich., 248;
City of Muskegon vs. Zeeryp, 134 Mich., 181;
City of Alma vs. Clow, 146 Mich., 443;
People vs. Smith, 147 Mich., 391-397;
City of Muskegon vs. Hanes, 149 Mich., 460;
Depres, Bridges & Noel vs. Zierleyn, 163 Mich., 399.

The Circuit Judge held, and so charged the jury, that where the goods were shipped in bulk consigned to respondent, and no mark upon any of the goods to indicate that they were for any particular order, or any particular person, the respondent was not within the protection of the interstate commerce law. There was undisputed evidence at the trial that at the car the respondent carried on a part of his business, as well as at the storehouse. We think the holding of the Circuit Judge finds support in the cases above cited.

In 1897 Act 248 of the Public Acts of that year was enacted, which was held unconstitutional by this court in Rodgers vs. Circuit Judge, 115 Mich., 441, for the same reason that is urged against the amendment in Act 225 of the Public Acts of 1907, to-wit, that it discriminated against a non-resident of the state. If it is true, as is urged, that Act No. 225, last above referred to, is unconstitutional for the same reason, then Sec. 5330 Compiled Laws remains in force.

(4) The next ground of error urged is that the complaint was not made and warrant issued until after sixty days from the time in which the offense charged was alleged to have been committed. We have already stated that the offense with which we are here dealing is by the statute made a misdemeanor. There are certain penalties provided for in the chapter under consideration. For instance, Sec. 5331 provides:

"Every person who shall be found traveling and trading as aforesaid, and who shall refuse to produce a license as a hawker or peddler to any officer or citizen who shall demand the same, shall, for each offense, forfeit the sum of ten dollars."

Then follows Sec. 5331-*b*, which provides that no prosecution for the recovery of any penalty imposed for any violation of the provisions of this chapter, relating to hawkers and peddlers, shall be maintained, unless it shall be brought within sixty days after the commission of the offense charged.

Respondent's counsel urges that this last section applies to the offense charged in this case. We do not so read the statute. The provision clearly relates to prosecutions for the recovery of the penalty and has no application here. This offense being a misdemeanor will be governed by the general statute with reference to the limitation of actions.

As the offense charged in the complaint and warrant was alleged with a videlicet, the prosecution was not confined to the exact day alleged. The record does not disclose that respondent asked that the prosecutor should elect as to the date upon which he relied, and we do not think this question is open. We find no error in the ruling of the Court in receiving evidence of actual sales. They tended to show that the respondent was engaged in the business of hawking and peddling.

We shall not consider all of the exceptions relating to the charge of the Court, for the reason that the Circuit Judge, under the undisputed evidence in the case, found that the respondent has violated the statute in his opinion, and so stated to the jury, giving the jury, however, the privilege of retiring to their room, selecting a foreman and returning a verdict. This privilege was exercised by the jury

and they returned a verdict of guilty. A careful reading of the record satisfies us that the conclusion reached by the Circuit Judge was the correct one, and it is not important to consider other parts of the charge, the jury having reached the same conclusion.

We find no reversible error in this record. The conviction is affirmed, and the Circuit Court is directed to proceed to judgment thereon.

J. W. STONE.
FLAVIUS L. BROOKE.
JOSEPH B. MOORE.
AARON V. McALVAY.
CHAS. A. BLAIR.

Endorsed: Filed November 3, 1911.

63 At a Session of the Supreme Court of the State of Michigan, Held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the Third Day of November, in the Year of Our Lord One Thousand Nine Hundred and Eleven.

Present: The Honorable Russell C. Ostrander, Chief Justice; John E. Bird, Joseph H. Steere, Joseph B. Moore, Aaron V. McAlvay, Flavius L. Brooke, Charles A. Blair, John W. Stone, Associate Justices.

No. 24622.

THE PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-,
vs.
DAVID J. STEWART, Defendant.

This cause having been brought to this Court upon exceptions from the Circuit Court for the County of Berrien, and the same and the matters and proceedings therein, having been seen and inspected and duly considered by the Court; Thereupon it is Ordered that it be certified to said Circuit Court for the County of Berrien, that there is no error in the rulings and proceedings therein, and the said Circuit Court is directed to proceed to judgment on the verdict.

STATE OF MICHIGAN, ss:

I, Charles C. Hopkins, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said Court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

In Testimony whereof, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this — day of —— in the year of our Lord one thousand nine hundred and —.

—— ——, *Clerk.*

64 STATE OF MICHIGAN:

In the Supreme Court.

THE PEOPLE OF THE STATE OF MICHIGAN, Plaintiffs,
vs.
DAVID J. STEWART, Defendant.

The Petition of David J. Stewart, the Above Named Defendant, by George W. Bridgman, His Attorney.

To the Honorable Russell C. Ostrander, Chief Justice of the Supreme Court of the State of Michigan:

Your petitioner David J. Stewart, by George W. Bridgman, his attorney, respectfully represents that he is the defendant in above entitled cause.

That this action was originally commenced in Justice Court, by complaint and warrant, charging defendant with a violation of Act 136 of the Compiled Laws of Michigan of 1897 as amended commonly known as the hawker and peddler law. The case was afterwards heard in the Circuit Court for Berrien County and State of Michigan on appeal, where defendant was convicted and thereupon he removed the cause to this Court by Writ of Error.

That on or about the 3rd day of November, A. D. 1911 an opinion was filed by this Court to the effect that the judgment of the Circuit Court should be affirmed and on said day final judgment was entered in this Court against this defendant.

Your petitioner further says that in the said Circuit Court and in this Court there was drawn in question the validity of a statute of the State of Michigan on the ground that the said statute was and is repugnant to the Constitution of the United States and the decision and judgment of this Court was in favor of the validity of such statute. The said statute being Act Number 136 of the Compiled Laws of the State of Michigan of 1897 as amended.

65 Among other things it was argued and insisted in the Circuit Court aforesaid and in this Court.

A. "That such law is in violation of § 8, Art. 1 of Constitution of "the United States, which vests in the Congress of the United States "the power to regulate commerce between the States. And as well in "violation of § 2, of Art. 4 of such constitution which provides that "citizens of each State shall be entitled to all the privileges and "immunities of citizens in the several States, and also that such law "is in violation of Art. 1 of the 14th Amendment to the Constitution "of the United States which provides that no State shall make or "enforce any law which abridges the privileges or immunities of "citizens of the United States nor deny to any person the equal pro-"tection of the laws."

B. "Because such law discriminates against the citizens of different "states and is in restraint of interstate commerce in this, that such "law expressly exempts from its operation any merchant who has "been conducting a regularly established mercantile business in any

"county of the State, for a period of at least one year previous, and "also provides that any wholesale merchant shall not be prevented "by anything herein contained from selling to dealers by sample "without any license."

All of which contentions were by this Court in the opinion and judgment aforesaid expressly overruled by this Court and by such Court decided that under the facts in this case the defendant was not within the protection of the interstate commerce laws of the United States.

Your petitioner further shows that a decision concerning the validity of said statute was necessary in the determination of said cause, and it was further necessary to determine whether under the facts appearing, defendant was protected by the interstate commerce laws of the United States.

That the validity of the said statute was actually decided by this Court,— and it was further decided that the defendant was not protected by the laws of the United States governing interstate commerce among he states. And that the judgment and decision rendered by this Court could not have been rendered and given without deciding the question whether the said statute is repugnant to the Constitution of the United States, and whether the defendant was protected by the laws of the United States governing commerce among the states.

That among the questions actually decided as aforesaid were whether said Act 136

1st. Is in violation of Sec. 8, Art. 1 of the Constitution of the United States, which vests in Congress of United States the
66 power to regulate commerce between the States.

2nd. Whether said Act 136 is in violation of § 2, of Art. 4 of such Constitution which provides that citizens of each State shall be entitled to all the privileges and immunities of citizens in the several states.

3rd. That such law, said Act 136, is in violation of Art. 1 of the 14th Amendment to the Constitution of the United States which provides that no State shall make or enforce any law which abridges the privileges or immunities of citizens of the United States nor deny to any person the equal protection of the laws.

4th. Whether such law discriminates against the citizens of different states and is in restraint of interstate commerce in this, that such law expressly exempts from its operation any merchant who has been conducting a regularly established mercantile business in any county of the state, for a period of at least one year previous, and also provides that any wholesale merchant shall not be prevented by anything herein contained from selling to dealers by sample without any license.

5th. Whether under the facts appearing in this case the defendant was protected by the laws of the United States regulating and governing commerce among the states.

Your petitioner conceives himself aggrieved by the final decision and judgment of this Court in this cause and prays that an order may be entered permitting a writ of error to issue to this Court, to

review said final judgment, in the Supreme Court of the United States.

And your petitioner will ever pray.

Dated Dec. 9th, A. D. 1911.

GEO. W. BRIDGMAN,
Attorney for Petitioner.

66½ [Endorsed:] State of Michigan. The Supreme Court for the State of Michigan. The People of the State of Michigan, Plaintiffs, vs. David J. Stewart, Defendant. Petition for Writ of Error. 18 D. L. N. 737. George W. Bridgman, Attorney for Petitioner.

67 UNITED STATES OF AMERICA, *ss:*

To the People of the State of Michigan, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of the State of Michigan wherein David J. Stewart is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward D. White, Associate Justice of the Supreme Court of the United States, this twenty-seventh day of December, in the year of our Lord one thousand nine hundred and eleven.

RUSSELL C. OSTRANDER,
Chief Justice of the Supreme Court of the State of Michigan.

67½ Due service of a copy of the within citation is hereby accepted.

Dated Dec. 28, 1911.

FRANZ C. KUHN, *Att'y Gen.,*
Attorney for Defendant in Error.

68 (Copy.)

Know all Men by the Presents, That we, David J. Stewart of the City of Chicago and State of Illinois, as principal, and William C. Jasper and Berthel J. Mayer, all of the township of Saint Joseph, County of Berrien, as sureties, are held and firmly bound unto The People of the State of Michigan in the full and just sum of Three Hundred Dollars *dollars*, to be paid to the said The People of the State of Michigan, its certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind our-

selves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 20th day of January in the year of our Lord one thousand nine hundred and twelve.

Whereas, lately at a session of the Supreme Court of the State of Michigan in a suit depending in said Court, between The People of the State of Michigan and David J. Stewart, a final judgment was rendered against the said defendant, David J. Stewart and the said defendant, David J. Stewart having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said The People of the State of Michigan citing and admonishing *it* to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof.

Now, the condition of the above obligation is such, That if the said David J. Stewart shall prosecute said writ to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

DAVID J. STEWART. [SEAL.]
WILLIAM C. JASPER. [SEAL.]
BERTHEL J. MEYER. [SEAL.]

Sealed and delivered in presence of—

ROY CLARK.
WM. T. HOWLAND.

Approved by—

JOSEPH B. MOORE,
Chief Justice of the Supreme Court of the State of Michigan.

March 1, 1912.

68½ STATE OF MICHIGAN,
County of Berrien, ss:

William C. Jasper and Berthel J. Meyer, all of the township of Saint Joseph, County of Berrien and State of Michigan, sureties on the within bond, each for himself says, after being duly sworn, *says* that he is worth in unincumbered real estate situate in said County of Berrien, not exempt from execution, the sum of Five Hundred (500) Dollars over and above all just debts, claims, exemptions, liens and incumbrances.

(Signed) WILLIAM C. JASPER.
BERTHEL J. MEYER.

Sworn and subscribed before me this 20th day of January, A. D. 1912.

ROY CLARK,
Notary Public, Berrion County, Mich.

My commission expires Jan'y 21, 1913.

69 Supreme Court of the United States.

THE PEOPLE OF THE STATE OF MICHIGAN, Plaintiff and Appellee and Defendant in Error,

vs.

DAVID J. STEWART, Defendant and Appellant and Plaintiff in Error.

And now comes the Defendant, David J. Stewart, by G. M. Valentine and G. W. Bridgman, his attorneys herein, and files the following assignments of error, upon which he relies, and says that in the record and in the proceedings in the above entitled cause in the Supreme Court of the State of Michigan, there is manifest error in this:

I.

The Supreme Court of the State of Michigan erred in its opinion filed in this cause November 3rd, A. D. 1911, affirming the judgment of the Circuit Court for Berrien County, Michigan, in holding and deciding that Chapter 136 of the Compiled Laws for the year 1897 of the State of Michigan, and the amendments thereto, is a valid enactment and that the same is not in violation of and is not repugnant to Section 8 of Article I of the Constitution of the United States which vests in the Congress of the United States the power to regulate commerce among the several states.

70 II.

The Supreme Court of the State of Michigan erred in its said opinion filed in this cause as aforesaid, in holding and deciding that said Chapter 136 of the Compiled Laws of 1897, of the State of Michigan and the amendments thereto, is not violative of and not repugnant to Section 2 of Article IV of the Constitution of the United States, which provides that the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states.

III.

The said Supreme Court of the State of Michigan erred in its opinion made and filed in this cause as aforesaid, in holding and deciding that the Statute of the State of Michigan, the same being Chapter 136 of the Compiled Laws of the State of Michigan for the year 1897, and the amendments thereto, is not in violation of and is not repugnant to Article I of the Fourteenth Amendment to the Constitution of the United States, which provides that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor deny to any person within its jurisdiction the equal protection of the laws.

IV.

The Supreme Court of the State of Michigan erred in its opinion in this cause filed as aforesaid, in holding and deciding that the afore-

said Statute of the State of Michigan does not discriminate against the citizens of other states, and that the same is not in restraint of interstate commerce.

71 V.

The Supreme Court of the State of Michigan erred in holding and deciding that under the facts shown by the evidence in this cause, the Defendant was not engaged in interstate commerce and that the business of the Defendant, as shown by the evidence, was not interstate commerce.

VI.

The Supreme Court of the State of Michigan erred in deciding in this cause that Section 5324 of the Compiled Laws of the State of Michigan for the year 1897, is not unconstitutional as a discrimination against *against* citizens of other states and that the enforcement thereof does not operate as an unlawful discrimination against citizens of other states.

VII.

The Supreme Court of the State of Michigan erred in holding and deciding that the said statute of the State of Michigan, being Chapter 136 of the Compiled Laws of 1897 of said State, and the amendments thereto, does not offend any provision of the Federal Constitution.

VIII.

The Supreme Court of the State of Michigan erred in not reversing the judgment theretofore rendered and entered against the Defendant in the Circuit Court for Berrien County, Michigan, and in affirming said judgment and in entering final judgment against the said Defendant, David J. Stewart, in said Supreme Court of the State of Michigan.

72 Wherefore the said Defendant, David J. Stewart, prays that the judgment of the Supreme Court of the State of Michigan in this cause affirming the conviction of said Defendant in the Circuit Court for the County of Berrien in the State of Michigan, may be reversed and held for naught, and that the said Defendant may be discharged from further prosecution under the Statute aforesaid, and under the warrant of arrest in this cause and that the Supreme Court of the State of Michigan be ordered to release and discharge the said Defendant from further prosecution.

G. M. VALENTINE,
GEO. W. BRIDGMAN,
Attorneys for Defendant David J. Stewart.

73 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Michigan, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of Michi-

gan before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The People of the State of Michigan and David J. Stewart wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construc-
74 tion of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened to the great damage of the said David J. Stewart as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the twenty-sixth day of December, in the year of our Lord one thousand nine hundred and eleven.

[Seal of the Circuit Court, Western District of Mich., Southern Division.]

CHARLES L. FITCH,
Clerk of the Circuit Court of the United States for the Western District of Michigan.

Allowed by

RUSSELL C. OSTRANDER,
Chief Justice of the Supreme Court of the State of Michigan.

74½ To the Supreme Court of the United States:

The execution of the within Writ appears by the transcript of record hereto annexed.

Dated, March 1st, 1912.

[Seal of the Supreme Court of Michigan, Lansing.]

CHAS. C. HOPKINS,
Clerk Supreme Court of the State of Michigan.

75 Supreme Court of the State of Michigan.

DAVID J. STEWART, Plaintiff in Error,
vs.
THE PEOPLE OF THE STATE OF MICHIGAN, Defendant in Error.

IN THE SUPREME COURT, *ss:*

I, Charles C. Hopkins, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the annexed and foregoing is a true and correct copy of the record, and of all proceedings had and determined in the above entitled cause by said Supreme Court, including the written decision and reasons therefor, signed by the Judges of said Court and filed in my office, as appears of record and on file in said cause; that I have compared the same with the original and it is a true transcript therefrom and of the whole thereof; that attached thereto are the petition for the writ of error, the Writ of Error with allowance endorsed thereon, the citation with acceptance of service endorsed thereon by the attorney for the adverse party, a copy of the bond duly approved, together with the assignments of error in the Supreme Court of the United States.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Supreme Court at the City of Lansing this first day of March in the year of our Lord, one thousand nine hundred and twelve.

[Seal of the Supreme Court of Michigan, Lansing.]

CHAS. C. HOPKINS,
Clerk of the Supreme Court of Michigan.

Endorsed on cover: File No. 23,177. Michigan Supreme Court. Term No. 239. David J. Stewart, plaintiff in error, vs. The People of the State of Michigan. Filed April 22d, 1912. File No. 23,177.

BRIEF

FOR THE PLAINTIFF IN ERROR

Supreme Court of the United States

OCTOBER TERM, 1913

No. 289

DAVID J. STEWART,

Plaintiff in Error.

vs.

THE PEOPLE OF THE STATE OF MICHIGAN,

Defendant in Error.

ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

G. M. VALENTINE.
G. W. BRIDGMAN.
Attorneys for Plaintiff in Error.

LEADER PUBLISHING CO., PRINTERS, BENTON HARBOR, MICH.

BRIEF

FOR THE PLAINTIFF IN ERROR

Supreme Court of the United States

OCTOBER TERM, 1913

DAVID J. STEWART,

Plaintiff in Error.

vs.

THE PEOPLE OF THE STATE OF MICHIGAN,

Defendant in Error.

ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

Statement of the Case

The plaintiff in error was arrested, tried and convicted in Justice Court, in Berrien County, Michigan, for a violation of a statute of that state concerning hawkers and peddlers, the same being Chapter 136 of the Compiled Laws of 1897 of the State of Michigan as amended.

The charge as set forth in the warrant of arrest reads as follows:

> "Whereas, I. W. Allen hath this day made complaint in writing and on oath, to me, Fremont Evans, a Justice of the Peace of the City of St. Joseph, in said county, that heretofore towit; on the 1st day of August A. D. 1909, at the ——— in the county aforesaid and for ten days preceding said day, one David J. Stewart did travel from place to place within the County of Berrien, State of Michigan, for the purpose of taking orders for the pur-

chase of goods, wares and merchandise, by sample lists and catalogues, without having then and there obtained a license as a hawker and peddler, as required and provided by Act 136 of the Compiled Laws of Michigan of 1897, as amended, as he the said I. W. Allen is informed and believes and has good reason to believe."

Transcript of Record, Page 1.

The use of the word "Act" in the warrant was a mistake. The word should have been "Chapter." It was the intention to charge a violation of Chapter 136 of the Compiled Laws of Michigan of 1897 as amended.

He appealed to the Circuit Court for the County of Berrien, where he was again tried and again convicted.

When the people rested its case on the trial in the Circuit Court, the defendant, by his attorney, prayed the court to instruct the jury to return a verdict of not guilty for the reasons following among others:

3rd. That the law of the State of Michigan mentioned in the complaint and warrant in this case, and upon which such complaint and warrant is made, is unconstitutional for the following reasons: (1st) That such law is in violation of Section 8 of Article 1 of the Constitution of the United States, which vests in the congress of the United States the powers to regulate commerce between the states; and as well in violation of Section 2 of Article 4 of such constitution, which provides that citizens of each state shall be entitled to all privileges and immunities of citizens in the several states. And also that such law is in violation of Article 1 of the 14th amendment to the constitution of the United States, which provides that no state shall make or enforce any law which abridges the privileges and immunities of the citizens of the United States, nor deny to any person the equal protection of the laws. Because such law discriminates against the citizens of different states, and is in restraint of interstate commerce in this, that such law expressly exempts from its operation any merchant who has been conducting a regularly established mercantile business in any county of the state for a period of at least one year previous; and also that it provides that any wholesale merchant shall not be prevented by anything herein contained from selling to dealers by sample without any license.

5th. That the respondent was at the time of his arrest engaged in interstate commerce as appears by the evidence.

6th. That at the time that the alleged acts complained of were committed by the defendant, he was at the time lawuflly engaged in interstate commerce, and not liable to arrest under the complaint and warrant in this case.

7th. And that at the time the said defendant, David J. Stewart, is charged with having solicited by sample orders for grocery—, flour, etc., from various people in Berrien County, he was then and there a resident of the State of Illinois, and engaged as a merchant in the City of Chicago, in said state, selling goods in the City of Chicago; and as such merchant, he was at the time alleged in the complaint and warrant, engaged in selling by sample groceries, flour, etc., to be afterwards delivered to the several parties, as solicited from his store and wholesale department in the City of Chicago; and as such merchant he was not liable to pay in the State of Michigan, a license tax under the law mentioned in the complaint and warrant in this case.

Transcript of record Pages 21 and 22.

The court overruled the motion and the defendant excepted.

Testimony was then introduced on the part of the plaintiff in error.

At the conclusion of the testimony the defendant, by his attorney, presented certain requests to the court among others the following:

1.

Refused. Now comes the above named defendant, by George W. Bridgman, his attorney, and prays the court to instruct the jury to return a verdict of not guilty, for the reason that at the time when the alleged acts complained of were committed by the defendant, he was at the time lawfully engaged in interstate commerce and not liable to arrest under the complaint and warrant in this cause. which said request the Court refused to give and marked against the same "Refused."

2.

Refused. At the time the said defendant, David J. Stewart, charged with having solicited by sample, orders for groceries, flour, etc., from various people in Berrien County, he was then and there a resident of the State of Illinois and engaged as a merchant in the City of Chicago and State of Illinois, selling goods in said City of Chicago, and as such

merchant he was at the time alleged in complaint and warrant, engaged in selling by sample, groceries, flour, etc., to be afterwards delivered to the several parties so solicited from his store and wholesale department in the City of Chicago; and as such merchant he was not liable to pay to the State of Michigan a license tax under the law mentioned in the complaint and warrant in this case. Which said request the Court refused to give and marked against the same "Refused."

4.

Refused. That the law of the State of Michigan, named in the warrant and complaint in this cause, and upon which such complaint and warrant is made, is unconstitutional, for the following reasons:

A. That such law is in violation of §8 of Article 1 of the Constitution of the United States, which vests in the Congress of the United States the power to regulate commerce between the States. And as well in violation of §2 of Article 4 of such constitution which provides that citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States, and also that such law is in violation of Article 1 of the 14th Amendment to the Constitution of the United States, which provides that no State shall make or enforce any law which abridges the privileges or immunities of citizens of the United States nor deny to any person the equal protection of the laws.

B. Because such law discriminates against the citizens of different states and is in restraint of interstate commerce, in this, that such law expressly exempts from its operation any merchant who has been conducting a regularly established mercantile business in any county of the state, for a period of at least one year previous, and also provides that any wholesale merchant shall not be prevented by anything herein contained from selling to dealers by sample without any license. Which said request the Court refused to give and marked against the same "Refused."

Transcript of Record Pages 32 and 33.

The Court declined to instruct the jury as requested in said written instructions, but on the other hand, then and

there refused to instruct the jury as requested and marked each of said requests with the word "Refused."

Transcript of Record, Pages 32 and 33.

Thereupon the Court on its own motion gave the instructions to the jury found on pages 34 and 35 of the Record.

The defendant thereupon assigned errors to the refusal to grant the several requests before mentioned. Record Page 36.

Therupon the case was taken to the Supreme Court of Michigan by exceptions after conviction and before sentence, where the judgment of the Circuit Court for the County of Berrien was affirmed. The opinion of the Supreme Court of the State of Michigan affirming said judgment appears at pages 39 to 44 inclusive of the record.

Thereupon the defendant sued out this writ of error.

The assignments of error in this Court appear on pages 49 and 50 of this record.

We copy the statement of the Supreme Court of the State of Michigan in this case as a sufficient statement of the facts except as hereinafter noted.

> "Upon the trial in the Circuit Court, the evidence tended to show that the respondent had for many years lived in the City of Chicago, Ill., and had been engaged in the running of a general store there, carrying a general stock of goods amounting to about $3,000 or $4,000. This store appears to have been in charge of respondent's wife, brother and son, while the respondent has spent most of his time for the past several years in Michigan, soliciting orders and selling goods, which were shipped into Michigan from his store. He has never obtained nor procured a license as required by the statutes above referred to. The course of business seems to have been that the respondent would ship these goods to St. Joseph in carload lots, and included therein were flour, sugar, coffee tea, soaps, etc. The sugar was put up in packages of 25, 50 and 100 pound sizes, and the sugar was packed together. Teas, coffees, flour, and many other articles were put in packages varying in size, and placed in the car. Each kind of goods was packed separately; that is, all coffee in one bulk, and all tea in one bulk, etc. This car of goods would be consigned to the respondent himself, and

there would be no mark of any kind upon any of the goods to identify the goods with any particular order, or any particular person.

When the car arrived, the respondent would fill therefrom orders, which he claimed to have previously solicited and taken. When an order of goods which had been taken was refused, or for any reason the order of goods was not delivered, the goods would be returned to the car, or placed in a warehouse or storehouse provided by respondent for that purpose. At the time respondent took orders, his practice was to make out a duplicate slip of each order, forwarding one to the Chicago house and retaining the other, and from the slip retained he would fill the various orders from the car. The retained slip seemed to have been the only means that respondent had of determining the contents of the various orders, or to whom they belonged. The car would be allowed to remain upon the side track at St. Joseph for several days, from which place the delivery of goods would be made, and from which place respondent would sell goods at times. It appeared in the evidence that at the time of the trial in the Circuit Court respondent had a stock of goods amounting to about $100 stored in his warehouse or storehouse in the City of Benton Harbor, from which latter place he would make deliveries for either orders taken or goods sold."

Transcript of Record, 40 and 41.

See also People vs. Stewart, 167 Mich. 417.

The Supreme Court of Michigan in delivering its opinion in this case used the following language: "Refused goods were returned to the car or a warehouse or storehouse kept and maintained by respondent and new orders were filled and goods sold from this place."

Transcript of Record, Page 42.

The statement by the Court that new orders were filled from any car, warehouse or storehouse is not sustained by the record.

We quote all the evidence in this matter.

Witness DeForrest Leach testified as follows:

Q. Did you store any goods some place, draw them to a storage and put them in storage?

A. Occasionally a lot was was left over that wasn't wanted and I had them in my possession down there.

Q. What do you mean by a lot that wasn't wanted?

A. Where folks would order stuff and when they came they wouldn't be in shape to take them.

Q. What was done with the goods?

A. Some returned back to Chicago and some of them was sold to other parties *on orders that was previously taken.*

Transcript of Record, Page 8.

Witness Gustav Ergang testified as follows:

Q. There were some cases in which, I presume, either the people had left the city or were absent when you got around to deliver the goods so you could not deliver them. I suppose you had instances of that kind?

A. Yes sir.

Q. What did you do with the goods?

A. I took them back to the car. I bring the bill of goods back and tell Mr. Stewart, the circumstances, those people were not home or had left town and I return the goods to him. I don't know what became of them afterwards.

Transcript of Record, Page 14.

Paul Remus testified as follows:

Q. You know they came from Chicago here?

A. I knew they came from Chicago here. It seems to me we have got some stuff from the boat. That is a special order.

Q. That was a special order from Chicago?

A. Yes sir: Once Mr. Hackstaff took orders up, I think for Mr. Stewart and I was short one time and I think one barrel of flour I got through the Graham boat from Chicago. The drayman brought it up from the boat. It was directed to me.

Transcript of Record Page 17.

Witness Nancy A. Harner testified.

I think if I haint mistaken I bought a sack of flour down there about the 3rd day of July. I wasn't there to give my order in the spring and I heard he had flour there and I went down to see if he wouldn't sell me a sack of flour. I have ordered from him before and after. Every time he comes to our house, I order from him.

Transcript of Record, Page 21.

Harvey S. Stewart, a witness for Defendant, testified:

Q. Now when those goods came over here and your father could not dispose of them to the people that had ordered them, what would he do with the goods?

A. I don't know.
Q. Did any goods ever come back?
A. Yes sir.
Q. How did that happen?
A. Sent back to the house.
Q. By whom?
A. By my father sometimes.
Q. What for?
A. To be returned to the house.
Q. Those goods were shipped to the drayman, Leach, and he was to deliver them for your house.
A. Yes sir.
Q. And the goods when he didn't deliver them he sometimes kept them in stock?
A. I don't know what he did with them.

Transcript of Record, Pages 29 and 30.

We repeat that there is no evidence in the record that new orders were filled from any place of business in this state. There is some slight evidence in the record that in one instance goods not taken on previous orders, were sold at the car. Such a sale was domestic commerce, but it was neither hawking nor peddling, nor did such transaction fall within any of the provisions of the Statute of Michigan, upon which the prosecution in this case was founded.

So much of the statute of the State of Michigan as is deemed necessary to the decision of the case is here printed at length, the same being Section 5324, 5329, of the Compiled Laws of the State of Michigan for the year 1897 and Section 5330 of said statute as amended by Act. No. 225 of the Public Acts of the State of Michigan for the year 1907.

They read as follows:

Sec. (5324) Sec. 16. No person shall be authorized to travel from place to place within this state, for the purpose of carrying to sell or exposing to sale any goods, wares, or merchandise, or to take orders for the purchase of goods, wares, or merchandise, by sample list or catalogues, unless he shall have obtained a license as hawker and peddler in the manner hereinafter directed.

(5329) Sec. 21. Every person who shall be found traveling and trading, or soliciting trade within the limits of this state, contrary to the provisions of this chapter, or contrary to the terms of any license that

may have been granted to him as hawker or peddler shall be deemed guilty of a misdemeanor, and upon conviction thereof before any court of competent jurisdiction, shall be punished by a fine of not more than fifty dollars and cost of prosecution, or by imprisonment in the county jail for a period not exceeding three months, or by both such fine and imprisonment, in the discretion of the court before which the conviction may be had.

(5330) Sec. 22. Nothing contained in this chapter shall be construed to prevent any manufacturer, farmer, mechanic or nurseryman from selling his work, or production by sample or otherwise without a license, nor shall any peddler in meat or fish be prevented by anything herein contained from peddling such meat or fish without a license, nor shall any merchant who has been conducting a regularly established mercantile business in any county of the State for a period of at least one year previous be prevented by anything herein contained from selling groceries, dry goods or general merchandise from a wagon within the limits of his county or adjoining counties without a license so long as he shall continue such regularly established mercantile business; nor shall any wholesale merchant be prevented by anything herein contained, from selling to dealers by sample without license, but no merchant shall be allowed to peddle, or to employ others to peddle goods not his own manufacture, except as above specified, without the license in this chapter provided.

Specification of the Errors Relied Upon

The plaintiff in error relies upon all the Assignments of Error in this Court as the same are shown on pages 49 and 50 of the Transcript of Record.

Assignments of Error Numbers I, IV and V are directed to the holding of the Supreme Court of the State of Michigan that the statute in question and under which the defendant was prosecuted and convicted, is not in conflict

with and is not repugnant to Section 8 of Article I of the Constitution of the United States, which vests in the Congress of the United States the sole power to regulate commerce among the several states.

Plaintiff in error also relies upon Assignments of Error, Number II and VI upon the ground that the Supreme Court of the State of Michigan erred in holding and deciding that the statute of the State of Michigan, under which the defendant was prosecuted and convicted, is not violative of and is not repugnant to Section 2 of Article IV of the Constitution of the United States, which provides that the citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states.

Plaintiff in error also relies upon Assignment of Error Number III, in which it is claimed that the Supreme Court of Michigan erred in its opinion in this cause in holding and deciding that Chapter 136 of the Compiled Laws of 1897 and the amendments thereto is not repugnant to and is not violative of Article I of the Fourteenth Amendment to the Constitution of the United States, which provides that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor deny to any person within its jurisdiction the equal protection of the laws.

Plaintiff in error also relies upon Assignments of Error, Number VII and VIII on the ground that the Supreme Court of Michigan erred in hoilding and deciding that the said statute of the State of Michigan being Chapter 136 of the Compiled Laws of said state as amended does not offend any provision of the Federal Constitution and in not reversing the judgment theretofore rendered and entered against the defendant in the Circuit Court for Berrien County, Michigan, and in not entering a final judgment discharging the said plaintiff in error, David J. Stewart, from further prosecution under the said statute of the State of Michigan.

Brief of the Argument

BRIEF OF THE ARGUMENT.

The sole question in this case, is whether the fact that Stewart caused the goods for which orders had been taken to be consigned to himself and without having the name of the purchaser on each package, took the transaction out of the protection of the "Commerce Clause" of the Federal Constitution.

We believe that Section 8 of Article 1 of the Constitution of the United States and Section 2 of Article IV of such Constitution are to be liberally construed for the benefit of the states and its citizens.

We believe the authority of Congress in this regard is exclusive, and that no state, except in the exercise of the police power for the security of the lives, health, and comfort of persons and the protection of property, can make any law or regulation which will affect the free and unrestrained intercourse and trade between the states as the Federal Constitution left it, or which will impose any discriminating burden or tax upon the citizens or products of other states coming or brought within its jurisdiction. We believe that the law is too well settled to require the citation of authorities upon this point.

The Supreme Court of Michigan held the transactions to be domestic commerce, because the plaintiff in error caused the goods for which he had taken orders to be consigned to himself in the State of Michigan, with no mark upon any of the goods to indicate that they were to fill any particular order or that they were for any particular person.

Transcript of Record Pages 39 to 44.

We believe that the decisions of this Court determine the case in favor of the plaintiff in error.

Asher vs. Texas, 128 *U. S.* 129. 32 *Law Ed* 368.
Robbins vs. Shelby County Taxing District, 120 *U. S.* 489. 30 *Law Ed.* 694.
Brennan vs. City of Titusville 153 *U. S.* 289. 38 *Law Ed.* 719.
Caldwell vs. North Carolina 187 *U. S.* 622-47 *Law Ed.* 336.
Rearick vs. Pennsylvania 203 *U. S.* 507. 51 *Law Ed.* 295.
Dozier vs. Alabama 219 *U. S.* 124-54 *Law Ed.* 965.

Crenshaw vs. Arkansas, which was a case decided in this Court, February 24th, 1913, and found in Advance Sheets published by Lawyers Co-operative Publishing Company under date March 15th, 1913. U. S. Supreme Court 57 Law Ed. 565.

We quote the following on this point from Dillon on Municipal Corporations 5th Edition, page 2328. Sec. 1356.

"Various decisions are to be found by Courts of different States which purport to sustain a tax

imposed upon canvassers, or drummers selling goods to be afterwards brought within the State, where the goods have been shipped in bulk to the agent or drummer or to a distributing agent and have been by him delivered to the purchased instead of being shipped directly to the purchaser from without the State; but any *supposed ground of distinction* based upon the fact that the goods are shipped *to the salesman or distributing agent in bulk and by him assorted and delivered to the purchasers, has been rejected by the Supreme Court of the United States, which has declared that the grounds of distinction are not sufficient to remove the transactions from the domain of interstate commerce.*"

In Caldwell vs. North Carolina, Supra, a taxing ordinance of the city of Greensboro was held invalid as an unlawful interference with interstate commerce, where a portrait company engaged in making pictures and frames in Chicago sold them upon orders solicited in North Carolina, shipping pictures and frames in separate packages to its own agent, who placed the pictures in their proper frames and delivered them to the persons ordering them. This was held to be a transaction of interstate commerce and beyond the taxing power of the state, it was held to make no difference that the pictures and frames were shipped to the company itself in Greensboro, where the agent of the company received them from the railroad at its depot, carried them to his room in Greensboro, *opened the packages, took out and assorted them, and put them together, and in this form delivered them to the purchasers in the city of Greensboro, who had previously ordered them,*

This Court in that case said: "Nor does the fact that these articles were not shipped separately and directly to each individual purchaser, but were sent to an agent of the vendor at Greensboro, who delivered them to the purchasers, deprive the transaction of its character as interstate commerce. It was only that the vendor used two instead of one agency in the delivery. It would seem evident that if the vendor had sent the articles by an express company, which should collect on delivery, such a mode of delivery would not have subjected the transaction to state taxation."

In Crenshaw vs. Arkansas, Supra, the plaintiffs in error, Crenshaw and Gannaway, were convicted under a statute of Arkansas undertaking to regulate the sale of steel stove ranges and other articles in that state. A corporation organized under the law of Missouri manufactured ranges

in the City of St. Louis. It employed sample men in Arkansas who went about that state exhibiting the sample and taking orders for ranges, but in no case selling ranges. All orders so taken were forwarded to an agent of the range Company in Arkansas, who investigated the credit of the purchasers and if such credit was found satisfactory, the orders were filled. All ranges ordered were shipped in car load lots from St. Louis, each car containing sixty separate ranges and being consigned by the company to itself, in care of its own agent in Arkansas. All ranges were taken from the car and delivered to the purchaser by delivery men, such delivery was in the precise form, condition and package in which they were delivered to the common carrier at St. Louis. Under no circumstances did the delivery men sell, offer to sell, or take any orders for ranges, or deliver any ranges other than those for which orders had been previously taken. The plaintiff in error, Gannaway had solicited and taken orders and the plaintiff in error, Crenshaw had delivered ranges to parties who had previously given orders to salesmen.

This court after an exhaustive review of the authorities said:

> "Business of this character, as well settled by the decisions of this court, constitutes interstate commerce, and the privilege of doing it cannot be taxed by the state."

In view of the many decisions of this Court on the question at issue, it may be superflous to cite the decisions of state Courts, but it is submitted that they generally do not differ from this Court.

Importation of goods from outside the state as ordered by purchasers is an act of *interstate commerce, although the goods are shipped to a general agent in the state, who repacks them and sends them to subordinate agents, who deliver them to the purchasers.* Huntington vs. Mahan 142 Ind. 695, 42 N. E. 463., 51 Am. St. 200. See also:

Bloomington vs. Bourland 137 *Ill.* 534. 27 *N. E.* 692. 31 *Am. St. Rep.* 382.

McLaughlin vs. City of South Bend, 126 *Ind.* 471. 26 *N. E.* 185.

Martin vs. Town of Rosedale, 130 *Ind.* 109. 29 *N. E.* 410.

Carstairs vs. O'Donnell, 154 *Mass.* 357. 28 *N. E.* 271.

People vs. Bunker, 128 *Mich.* 160., 87 *N. W.* 90.

It was held in Stone vs. State, 117 Georgia 292, 43 S. E. 470, reversing a former decision in that state and following the decision of this Court in Caldwell vs. North Carolina, that a statute making it a misdemeanor for a peddler or itinerant trader, except such as are exempted by law, to sell any goods, wares, or merchandise without a license from the proper authorities, was prevented by the interstate commerce clause from being operative against one who as the representative of a principal, residing in another state, takes orders for the purchase of goods held in such other state; and who, when the goods are shipped by his principal, receives them, breaks the original packages in which they are contained, and distributes them among the customers from whom orders were obtained, receiving from them the price of the goods.

In Turner vs. State 41 Tex. Crim. Rep. 545, 55 S. W. Rep. 834, a statute imposing a tax upon the occupation of a traveling person engaged in selling patent and other medicines was held unconstitutional as applied to one employed by a nonresident concern, on salary, to sell goods by sample, the orders secured being transmitted to the employer, subject to his approval, to be filled, whereupon the goods were shipped consigned to the employer, and delivered direct from the car, *though the packages were not marked with the name of each purchaser.*

See also In Re Spain 14 L. R. A. 97, 3 Inters. Com. Rep. 738, 47 Fed. 208, where a statute imposing a license tax on peddlers was held to be an unconstitutional regulation of interstate commerce, as applied to persons engaged in showing samples of goods manufactured by their principal in another state, and in taking orders for such goods, which are transmitted to the principal to be filled, *even though in filling such orders the articles are sent in bulk to the agent, to be distributed by him.*

We have ventured to cite the case of People vs. Bunker, Supra, despite the fact that the Supreme Court of Michigan is able to distinguish it from the case at bar.

The Supreme Court of the State of Washington was of the opinion that the case of the People vs. Bunker, Supra, was correctly decided and that the Supreme Court of Michigan in its later opinions, some of which are cited in the opinion of the Supreme Court of Michigan, in this case were departures from its former opinion and that in the Bunker case the Michigan Court apparently bowed to the

wisdom and interpretation of its superior, The Supreme Court of the United States.

State Ex. Rel South Bend vs. Glasby, 50 *Wash.* 598, 97 *Pac.* 734, 21 *L. R. A. N. S.* 797.

It is respectfully submitted that there is manifest error in the record; that for the reasons above given, the Statute of the State of Michigan upon which the prosecution of the defendant David J. Stewart is founded, should be held to be violative of the Federal Constitution in the particulars aforesaid; that the judgment of the Supreme Court of the State of Michigan in this cause should be reversed and held for naught and final judgment should be entered in this Court in favor of the plaintiff in error releasing and discharging him from further prosecution under the warrant of arrest in this cause.

Benton Harbor, Mich., Jan. 15th, 1914.

G. M. VALENTINE.
G. W. BRIDGMAN.
Attorneys for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 239.

DAVID J. STEWART,
Plaintiff in Error,
vs.
THE PEOPLE OF THE STATE OF MICHIGAN,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT.

This is error to the State Court. Plaintiff in error had for many years lived in the City of Chicago and had been engaged in the running of a general store there with a stock of goods amounting to three or four thousand dollars; the store was in charge of his family, being conducted by his wife, brother

and son. Respondent spent most of his time in Michigan for several years soliciting orders and selling goods which were shipped into Michigan from his store. He never obtained a license required by the State under its hawkers and peddlers Act. He would ship his goods to St. Joseph in the State of Michigan in carload lots; Sugar would be put up in packages of twenty-five, fifty and one hundred pounds each; teas, coffees, flour and other articles in various sized packages would be placed in the car. Each kind of goods was packed separately, all coffee in one bulk and all tea in one bulk, etc. This car of goods would be consigned to the plaintiff in error and when the car arrived plaintiff in error would fill orders therefrom which he claimed to have previously solicited and taken. If this had been all that the plaintiff in error did he would have undoubtedly been engaged in interstate commerce exclusively and immune from the hawkers and peddlers Act under the holdings in the *Brennan, Crenshaw, Bunker* and other cases cited by plaintiff in error in his Brief in this court. But the plaintiff in error did something more; he maintained a warehouse within the State at the City of Benton Harbor, where he stored goods, and from which he also sold goods and filled orders. We quote some excerpts from the opinion of the State Court showing the finding of that court upon questions of fact:

> "When an order for goods which had been taken was refused, or for any reason the order of goods was not delivered, the goods would be returned to the car or *placed in a warehouse or storehouse* provided by respondent for that purpose * * * *
>
> "It appeared in evidence that at the time of the trial in the Circuit Court Respondent had a stock of goods amounting to about One Hundred Dollars stored in *his warehouse* or *storehouse* in the City of Benton Harbor *from which place* he would make deliveries for either goods taken or goods sold * * * *

> "Refused goods were returned to the car or *warehouse* or *storehouse*, kept and maintained by Respondent, and new orders were filled and goods sold *from this place* * * * *
>
> "There was undisputed evidence at the trial that at the car respondent carried on a part of his business, *as well as at the storehouse.*"

It will therefore be seen from these excerpts that the State court found as a matter of fact that the plaintiff in error was not only engaged in interstate commerce, but that he was also engaged in domestic commerce. If he was maintaining a warehouse in the City of Benton Harbor from which he filled orders and did business he was engaged in interstate commerce, and the case falls squarely within the holding of this court in

American Steel & Wire Co. vs. Speed, 192 U. S. 500;

See also

Emmet vs. Missouri, 156 U. S. 296.

Indeed it is conceded by the plaintiff in error that under these findings plaintiff in error was engaged in domestic commerce. We quote what is said by the plaintiff in error at page 8 of his brief:

> "We repeat that there is no evidence on the record that new orders were filled from any place of business in this State. There is some slight evidence in the record that in one instance goods not taken on previous orders were sold at the car; such a sale was domestic commerce but it was neither hawking nor peddling nor did such transaction fall within any of the provisions of the statutes of Michigan upon which the prosecution in this case was founded."

We therefore have upon this record a finding by the State Court of facts constituting plaintiff in error a Michigan dealer and, under such facts, a violator of the Michigan Hawkers and Peddlers Act, which holding is sought to be reviewed by this Court. In other words, a reversal is asked upon the grounds (1st) That the finding of the State Court is unsupported by the evidence in the case and, (2nd) The State Court misconstrued the Michigan Act in question in determining that the plaintiff in error was under the facts bound by its provisions. We understand the rule to be well settled by a long line of authorities that this court will not go into the record, nor will it determine the question as to whether the findings of fact by the State Court are supported by the evidence, but will take the finding of fact of the State Court as conclusive. Neither will this court review the construction put upon a state statute by a state court upon error to that court. It should be said in passing that the Commerce clause is the only one involved in the brief of plaintiff in error.

ARGUMENT.

The state court did not question the rule laid down by this Court in the case of

Brennan vs. Titusville, 153 U. S. 289,

nor in the case of

People vs. Bunker, 128 Mich. 160,

and kindred cases, which announced the rule that one engaged in interstate commerce is not liable to pay a hawkers and peddlers license fee exacted by a state statute, because so to require would be levying a tax upon commerce and therefore in conflict with the commerce clause of the Fed-

eral Constitution. But the State Court held that the facts in the Bunker and Brennan cases differ materially from the facts in the case at bar. After stating that the state court recognized the rule as laid down in the Bunker case, the court said:

> "The facts in that case differ materially from those in the instant case. In the *Bunker case,* respondent was selling knives by sample; and, as stated in the opinion, he did not have with him, or at any place in the State, any stock of knives with which to furnish customers, or to fill orders; that every knife for which an order would be taken would be furnished by the firm at Canton and sent to him for delivery.
>
> The further case cited by counsel, that of *Brennan v. Titusville,* 153 U. S. 289 (14 Sup. Ct. 829), cited in the *Bunker Case,* is a case where picture frames were sold only by sample, were manufactured in Illinois, and the goods were sent by express, either to the purchaser or to the agent, and the moneys collected and sent to the manufacturer. Here the respondent solicited orders, and shipments were made in car load lots in bulk, unidentified, and consigned to the respondent. Refused goods were returned to the car, or a warehouse or storehouse kept and maintained by respondent, and new orders were filled and goods sold from this place. None of the orders were kept separate, nor was any identification mark placed upon any of the goods to distinguish them, or to indicate that they belonged to any particular order or person; and the sales were really made in this State. Many authorities could be cited holding that the interstate commerce law does not obtain under such circumstances. The decisions of this court have so decisively settled this question that we do not cite other authorities. People vs. Sawyer, 106 Mich. 428 (64 N.

W. 333); City of Muskegon vs. Zeeryp, 134 Mich. 181 (96 N. W. 502); City of Alma vs. Clow, 146 Mich. 443 (109 N. W. 853); People vs. Smith, 147 Mich. 391-397 (110 N. W. 1102); City of Muskegon vs. Hanes, 149 Mich. 460 (112 N. W. 1077); Depres, Bridges & Noel vs. Zierleyn, 163 Mich. 399 (128 N. W. 769).

In

Telluride Power Co. vs. Rio Grande & C. Ry Co., 175 U. S. 639, 647;

It was said by the Court:

"But the difficulty in this case is that before it could be said that any right or title under a statute of the United States had been denied it was necessary to establish as a question of fact priority of possession on the part of the Telluride Company as well as conformity to local customs, laws and decisions. These were local and not Federal questions. The jurisdiction of this court in this class of cases does not extend to *questions of fact* or of *local* laws which are merely preliminary to or the possible basis of a Federal question."

Smiley vs. Kansas, 196 U. S. 447;

Passes upon both the question whether this court can review questions of fact upon error to the State Court, and whether it can review the construction placed upon a state statute by the State Court. We quote what was said on this subject:

"The verdict of the jury settles all questions of fact. In Missouri, Kansas &c. Ry. Co. vs. Haber, 169 U. S. 613, it is said: 'Much was said at the bar about the finding of the jury being against the evidence. We cannot enter upon such an inquiry. The facts must be

taken as found by the jury, and this court can only consider whether the statute, as interpreted to the jury, was in violation of the Federal Constitution. *Chicago, Burlington & Quincy Railroad v. Chicago,* 166 U. S. 226, 242, 246.'

We pass, therefore, to a consideration of the questions of law. It is contended that the act of 1897 is in conflict with the Fourteenth Amendment to the Federal Constitution, in that it unduly infringes the freedom of contract; that it is too broad and not sufficiently definite, and that while some things are denounced which may be within the police power of the State, yet its language reaches to and includes matters clearly beyond the limits of that power, and that there is no such separation or distinction between those within and those beyond as will enable the courts to declare one part invalid and another part void. We quote from the brief of counsel for plaintiff in error:

> 'Section one goes entirely too far and is an unwarranted attempt upon the part of the legislature to limit the rights of the individual in the matter of contracting and dealing with his fellow men. The liberty to contract is as much protected by the constitutional provisions above referred to as is the liberty of person, and any attempt to abridge or limit that right will be held void, unless such abridgement or limitation is necessary to preserve the peace and order of the community or the life, liberty and morals of individuals, in which cases it is held to be the proper exercise of the police power of the State.'

It may be conceded for the purposes of this case that the language of the first section is broad enough to include acts beyond the police power of the State and the punishment of which would unduly infringe

upon the freedom of contract. At any rate we shall not attempt to enter into any consideration of that question. The Supreme Court of the State held that the acts charged and proved against the defendant were clearly within the terms of the statute, as well as within the police power of the State; and that the statute could be sustained as a prohibition of those acts irrespective of the question whether its language was broad enough to include acts and conduct which the legislature could not rightfully restrain.

It is well settled that in cases of this kind the interpretation placed by the highest court of the State upon its statutes is conclusive here. We accept the construction given to a state statute by that court. *St. L., I. M. & St. P. Ry. Co. v. Paul, 173 U. S. 404, 408; M., K. & T. Ry. Co. v. McCann, 174 U. S. 580, 586; Tullis v. L. E. & W. R. R. Co., 175 U. S. 348.* Nor is it material that the state court ascertains the meaning and scope of the statute as well as its validity by pursuing a different rule of construction from what we recognize. It may be that the views of the Kansas court in respect to this matter are not in harmony with those expressed by us in *United States v. Reese, 92 U. S. 214; Trade-Mark Cases, 100 U. S. 82; United States v. Harris, 106 U. S. 629, and Baldwin v. Franks, 120 U. S. 678.* We shall not stop to consider that question nor the reconciliation of the supposed conflicting views suggested by the Chief Justice of the State. The power to determine the meaning of a statute carries with it the power to prescribe its extent and limitations as well as the method by which they shall be determined."

Noble vs. Mitchell, 164 U. S. 367,

Is another case where this Court was asked to review the

construction placed upon the state statute by the Supreme Court of the State, and it was said:

> "This construction of the Alabama statute, although made by the Supreme Court of that State, it is urged is erroneous, and we are invited to disregard it; but manifestly the interpretation of a statute of the State of Alabama by the Supreme Court thereof under the circumstances here presented is binding on us. *Dibble v. Bellingham Bay Land Co. 163 U. S. 63, 73; Union Bank v. Louisville, New Albany &c. Railway, 163 U. S. 325, 331.*
>
> Reading, then, into the Alabama statute the construction given thereto by the court of last resort of that State, the argument of the plaintiff in error amounts to this, that, although it is admitted that the law of the State of Alabama regulating the doing of insurance business by foreign corporations is not in conflict with the Constitution of the United States, nevertheless we should hold that it does violate that Constitution, because of another and separate law of Alabama, which it is asserted would be unconstitutional if it were before us for consideration. Of course, to state this proposition is to answer it.
>
> It is suggested that there is no adequate proof that the policy in controversy was issued by a foreign corporation. This involves a mere question of fact, which was submitted to the jury by the trial court, and as to which the Supreme Court of Alabama said there was evidence sufficient for the consideration of the jury, and which is not subject to review here on writ of error. *Dower v. Richards*, 151 U. S. 658; In re Buchanan, 158 U. S. 31."

Tulluride Power Co. v. Rio Grande &c. Ry. Co., 187 U. S. 569, 584.

After quoting from the opinion of the Supreme Court of the State of Utah (the case being reviewed on error to that court) it was said:

> "From this excerpt it appears that the Supreme Court construed the statutes and constitution of Utah, deciding that the Power Company had no existence as a corporation in the State, and could acquire, therefore, no rights as such, and 'was not in a position to question the right of the plaintiff (defendant in error) in the premises.' And no independent right was found in Nunn. What was done by him the court said was done 'for the use and benefit of the defendant company.' And it was decided that he was not 'a personal claimant and owner of the right of way in controversy as against the right of way acquired by respondent (plaintiff in error).' These conclusions did not involve the decision of Federal questions. The first depended upon a finding of fact. Neither, therefore, is reviewable by us."

To the same effect is

> Gardiner vs. Bonestell, 180 U. S. 262, 290.

At the last cited page it was said:

> "The trial court, in addition to its findings in reference to the proceedings in the Land Department, found, as independent matters of fact, that the land in controversy was outside the exterior boundaries of the grant, and that Throckmorton was not a *bona fide* purchaser. The Supreme Court of the State sustained those findings. Now, in proceedings in this court to review the action of state courts we do not enter into a consideration of questions of fact. We accept the

> determination of those courts in such matters as conclusive, and inquire simply whether there have been errors or law. Dower v. Richards, 151 U. S. 658; Egan v. Hart, 165 U. S. 188; Hedrick v. Atchison, Topeka &c. Railroad Co. 167 U. S. 673, 677."

In

Chrisman vs. Miller, 197 U. S. 313

It was said by Mr. Justice Brewer, speaking for the Court: "In cases coming from a State Court we do not review questions of fact but accept the conclusions of the State tribunals as final."

In

American Steel & Wire Co. vs. Speed, Supra,

It was said:

> "The argument is made that under the facts found by the Court below it was erroneously held that the Steel Company, because of the business which it carried on in the State of Tennessee, was a merchant within the statutes and the power to review this question, it is insisted, should be exerted because the question is Federal in its nature. The contention is without merit. As the levy of the merchants' tax violated no Federal right, the mere determination of who were merchants within the state law involved no Federal question. The construction of the state law being conclusive and embracing all persons doing a like business with the Steel Company, it follows that there was no discrimination."

Further citation of authorities seem to us unnecessary as the rule is well established in this court (1st) That the find-

ings of fact of the State Court are conclusive upon this Court upon writ of error to the State Court. (2nd) That upon like writ of error the construction and interpretation of a state statute is for the State Court. Applying these two rules to the instant case the State Court found (First) As a matter of fact that plaintiff in error in addition to his interstate business was also engaged in domestic commerce, maintaining a warehouse within the County and selling and filling orders therefrom, and determined (Second) That the Acts done by him in such domestic commerce brought him within the terms of the Michigan Hawkers and Peddlers Act.

We respectfully submit that neither of these questions present a Federal question and that the writ should be dismissed.

GRANT FELLOWS,
Attorney General,
Attorney for Defendant in Error.

STEWART *v.* PEOPLE OF THE STATE OF MICHIGAN.

ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

No. 239. Argued March 6, 1914.—Decided March 23, 1914.

Crenshaw v. *Arkansas*, 227 U. S. 389, followed to effect that the negotiation of sales of goods which are in another State, for the purpose of introducing them into the State in which the negotiation is made, is interstate commerce.

Where one has been convicted for violating a state statute which is unconstitutional as applied to the act committed, the conviction cannot be sustained because there was proof of another violation with which he was not charged, as conviction for the latter would be condemnation without hearing which would be denial of due process of law.

167 Michigan, 417, reversed.

THE facts, which involve the validity under the commerce clause of the Federal Constitution of a conviction under the peddling and hawking license act of Michigan, are stated in the opinion.

Mr. George M. Valentine and *Mr. G. W. Bridgman* for plaintiff in error, submitted:

Section 8 of Art. I and § 2 of Art. IV of the Constitu-

tion are to be liberally construed for the benefit of the States and their citizens.

The authority of Congress in this regard is exclusive, and no State, except in the exercise of the police power for the security of the lives, health, and comfort of persons and the protection of property, can make any law or regulation which will affect the free and unrestrained intercourse and trade between the States as the Federal Constitution left it, or which will impose any discriminating burden or tax upon the citizens or products of other States coming or brought within its jurisdiction.

The state court erred in holding the transactions to be domestic commerce, simply because plaintiff in error caused the goods for which he had taken orders to be consigned to himself in the State of Michigan, with no mark upon any of the goods to indicate that they were to fill any particular order or that they were for any particular person. See *Asher* v. *Texas*, 128 U. S. 129; *Robbins* v. *Shelby Taxing District*, 120 U. S. 489; *Brennan* v. *Titusville*, 153 U. S. 289; *Caldwell* v. *North Carolina*, 187 U. S. 622; *Rearick* v. *Pennsylvania*, 203 U. S. 507; *Dozier* v. *Alabama*, 219 U. S. 124; *Crenshaw* v. *Arkansas*, 227 U. S. 389; Dillon on Mun. Corp., 5th ed., p. 2328, § 1356.

Importation of goods from outside the State as ordered by purchasers is an act of interstate commerce, although the goods are shipped to a general agent in the State, who re-packs them and sends them to subordinate agents, who deliver them to the purchasers. *Huntington* v. *Mahan*, 142 Indiana, 695; *Bloomington* v. *Bourland*, 137 Illinois, 534; *McLaughlin* v. *South Bend*, 126 Indiana, 471; *Martin* v. *Rosedale*, 130 Indiana, 109; *Carstairs* v. *O'Donnell*, 154 Massachusetts, 357; *People* v. *Bunker*, 128 Michigan, 160; *Stone* v. *State*, 117 Georgia, 292; *Turner* v. *State*, 41 Tex. Crim. Rep. 545; *In re Spain*, 47 Fed. Rep. 208; *South Bend* v. *Glasby*, 50 Washington, 598.

Mr. Grant Fellows, Attorney General of the State of Michigan, for defendant in error.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

Plaintiff in error was tried and convicted in a Justice Court upon a criminal information which charged that "one David J. Stewart did travel from place to place within the County of Berrien, State of Michigan, for the purpose of taking orders for the purchase of goods, wares and merchandise, by sample, lists and catalogues, without having then and there obtained a license as a hawker and peddler as required and provided by chapter 136 of the compiled laws of Michigan, of 1897, as amended." From that judgment an appeal was taken to the county court where the cause was tried *de novo* by a jury, resulting again in a conviction, and that judgment was affirmed by the Supreme Court of the State (167 Michigan, 417). This writ of error was then prosecuted.

There are several assignments of error of a Federal nature, but the consideration of one—the asserted repugnancy of the statute upon which the warrant was based to the commerce clause of the Constitution of the United States—will enable us to dispose of the case. The statute provides:

"No person shall be authorized to travel from place to place within this state, for the purpose of carrying to sell or exposing to sale any goods, wares, or merchandise, or to take orders for the purchase of goods, wares, or merchandise, by sample list or catalogues, unless he shall have obtained a license as a hawker and peddler in the manner hereinafter directed."

Violation of the statute was made a misdemeanor punishable by fine or imprisonment.

Briefly stated, the material facts, which are uncontro-

verted, are as follows: The defendant resided in the City of Chicago where he was engaged in the general merchandise business, but much of his time was spent in the State of Michigan soliciting orders for groceries and other merchandise to be shipped from his Chicago store. Duplicates of the orders secured were mailed by him to his manager in Chicago, and goods corresponding to the orders were shipped in carload lots from the Chicago store consigned to the defendant at St. Joseph and other points in Berrien County, Michigan. Upon the arrival of the cars at St. Joseph the goods were delivered to the customers by draymen employed by the defendant, who filled the orders at the car by checking from the original orders, there being no identifying marks on the packages, except as to their contents. Customers living at a distance received notice by mail of the arrival of the cars and called or sent for their goods. If for any reason any orders were undelivered, the goods corresponding to such orders were returned to the Chicago store or placed in a storeroom which the defendant hired in Benton Harbor, Michigan, and there is some evidence tending to show that occasional sales were made by the defendant from the storeroom and from the car without previous solicitation.

Upon the above facts the trial court charged the jury as follows:

"In this case it is claimed by the defendant that he was engaged in interstate commerce and that he was protected by the Interstate Commerce Law.

"Now, it is true that a wholesale merchant or grocer, in the City of Chicago for instance, can solicit orders through an agent in this state and he can send an agent here to deliver the goods.

"The facts, however, in this case are different. The goods were shipped here in a car consigned to the defendant himself. The goods were never consigned to the man who made the order, and when they got here they were

not the goods of the man who made the order because if, any of those men who had made an order had gone down to the car they could not have claimed the goods that were there because they could not be identified. The packages were mixed promiscuously in boxes and there were no names on the packages. Moreover, those goods were not shipped according to the usual course of business, promptly, but there was a delay of some two or three months in the shipment of those wares.

"I hold, gentlemen, that there was no sale ever consummated until the goods were actually delivered by the drayman at the house. Ordinarily the sale is consummated at Chicago (where goods are ordered from Chicago) and the sale is consummated the moment they are shipped at the City of Chicago, directed to the consignee. In this case no sale was consummated whatever until the goods were actually delivered at the house.

"So I hold, practically, that the car was a mere warehouse or place of doing business by the defendant, and it was there that he distributed the goods as he pleased. For that reason, gentlemen, I hold that the defendant comes within the law and that he is what is called a hawker and peddler.

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"In this case, as it is only a matter of law, and there are no facts in dispute, it will be your duty of course, as a matter of form, to follow the direction of the court, I find, gentlemen of the jury, in this case that the defendant, under the evidence and the law, is guilty of the charge. . . ."

And the correctness of the charge thus given was in terms sustained by the Supreme Court of the State in its opinion.

The charge as thus given and affirmed is clearly in conflict with the rule announced in *Crenshaw* v. *Arkansas*, 227 U. S. 389, and the cases there reviewed. Indeed,

reference to authority is unnecessary, since it was admitted in the argument at bar that the judgment below in so far as it affirmed the action of the trial court in holding that there could be a conviction because of the deliveries of merchandise from the cars to fill orders previously solicited and obtained was erroneous because in conflict with the commerce clause of the Constitution. But it is said although there was manifestly reversible error from this point of view, nevertheless as from another point of view there was a ground adequate to sustain the judgment, there should be an affirmance. The court below it is said, not only placed its affirmance upon the erroneous ruling as to the sales made under orders, but also upon the ground that there was evidence showing some sales made from the car or store-room not under previous orders and as the latter sales were not within the shelter of the commerce clause, therefore the affirmance on that ground was an independent non-Federal conclusion sustaining the action of the court and calling for the duty of affirmance. But this proposition disregards the fact that the only charge made against the accused was for peddling and that the instructions of the court and the whole course of the trial conclusively established that the sales made from the car, as the result of the orders solicited, formed the sole basis for the prosecution, and the conviction therefore related to that and to that alone. If then it be admitted that the judgment below was placed upon two grounds, such admission would not establish that the judgment rested upon an independent state ground adequate to sustain it, since the first ground it is admitted was Federal and erroneous, and the second ground if upheld would amount to a condemnation without hearing and therefore constitute a denial of due process of law. Thus the proposition if sustained would require us to hold that an admitted violation of one constitutional right must be left uncorrected because at the same time another and equally

fundamental constitutional right was disregarded, a conclusion which would give effect to both wrongs obviously demonstrates our plain duty to reverse and remand for further proceedings not inconsistent with this opinion.

Reversed.

END OF Case